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No. 11180

249

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ,
as executor and executrix of the last will and testa-
ment of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 382, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JAN 30 1946

PAUL P. O'BRIEN!
CLERK

No. 11180

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In the District Court of the United States
Southern District of California
Central Division

No. 3930 R. J.—Civil

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation,
Plaintiff,

vs.

HARRY LUTZ and HARRY LUTZ and ROSE
LUTZ as executor and executrix of the last will and
testament of Abe Lutz, Deceased,
Defendants.

AMENDED COMPLAINT FOR RESCISSION AND
CANCELLATION OF LIFE INSURANCE
POLICY AND FOR DECLARATORY RELIEF

Comes now the above named plaintiff, New England Mutual Life Insurance Company of Boston, a corporation, and leave of court and the written consent of the adverse parties having been first obtained, files herein its amended complaint against defendants above named, and for cause of action complains and alleges as follows:

I.

That plaintiff is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts and engaged in and duly authorized by the laws of the State of California to engage in the business of life insurance in said State of California. [2]

II.

That the amount in controversy herein exceeds the sum of \$3,000, exclusive of interest and costs.

III.

That the jurisdiction of this court depends upon diversity of citizenship and upon the fact that the amount herein in controversy exceeds the sum of \$3,000, exclusive of interest and costs.

The within action is a controversy between citizens of different states, to-wit, New England Mutual Life Insurance Company of Boston, a corporation, plaintiff herein, which is and at all times herein mentioned was a citizen, resident and inhabitant of the State of Massachusetts, and defendants, Harry Lutz, individually, and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, who are and at all times herein mentioned have been citizens, residents and inhabitants of the State of California, residing within the subdivision of the Southern District of California of the within entitled court.

IV.

That plaintiff company, on information and belief, alleges that Harry Lutz and Rose Lutz are the duly appointed, qualified and acting executor and executrix of the last will and testament of Abe Lutz, deceased, duly admitted to probate in the Superior Court of the County of Los Angeles, State of California, in proceedings entitled in the Matter of the Estate of Abe Lutz, deceased, numbered 233176 on the records and files of said court.

V.

That on or about the 14th day of November, 1942, one Abe Lutz made application in writing to plaintiff company for a policy of insurance on his life; that said application was in writing and was signed by said Abe Lutz; that a full, true and [3] correct copy of said application, together with the answers made to the medical examiner, hereinafter referred to, and which constituted a part thereof, is attached to and made a part of a policy of life insurance issued on the life of Abe Lutz, being numbered and described as policy 1 172 844 of plaintiff company, and hereinafter identified and described.

VI.

That on or about the 16th day of November, 1942, in furtherance of and in connection with and as a part of said application for insurance, and for the purpose of inducing plaintiff company to issue a policy of insurance on his life, said Abe Lutz presented himself to the medical examiner of plaintiff company for medical examination and was then examined by said medical examiner of plaintiff company and made certain answers to said examiner in writing and signed the same. That said answers to said medical examiner were made a part of said application for insurance and a full, true and correct copy thereof is attached to and included in and made a part of a policy of insurance issued on the life of Abe Lutz and identified as policy number 1 172 844 of plaintiff company and as hereinafter described.

That at the date and time of making said application for said policy of insurance and as a part thereof, said applicant, Abe Lutz, requested that any policy to be thereafter issued be post-dated to October 13, 1942, in order

to be issued to said Abe Lutz as of the age sixty-four, and with request to prorate eleven months' premium and thereafter to be paid on an annual basis.

VII.

That subsequent to the making of said application and the time of said medical examination, plaintiff company delivered its policy of life insurance numbered 1 172 844 in the face amount of \$13,000 on the Ordinary Life Plan and upon its form of policy of life insurance numbered 500. That attached to and by its terms [4] made a part of said policy, and at the time of delivery thereof to Abe Lutz, was affixed a full, true and correct copy of his application therefor and answers to medical examiner as a part of said application, all of said policy, together with said application and answers to medical examiner as a part thereof, being the full and complete contract between plaintiff and said Abe Lutz. That, as hereinbefore alleged, said contract is in writing. Plaintiff relies upon said policy of life insurance and the whole thereof, including said application for said policy, which is contained therein and made a part thereof. That, as before alleged, said policy is numbered 1 172 844. That in and by said policy of life insurance it was provided, among other things, that on receipt of due proof, on forms prescribed by the company, of the death of Abe Lutz, the insured named therein, plaintiff company would pay to Harry Lutz, son of the insured, or if deceased, the executors, administrators or assigns of said son, the sole owner of said policy, the sum of \$13,000, the face amount of said policy.

That the insured named in said policy of life insurance was and is Abe Lutz.

VIII.

That plaintiff company is informed and believes and upon such information and belief alleges that the insured named and described in policy, Abe Lutz, died in the City of Los Angeles, County of Los Angeles, State of California, on or about the 28th day of May, 1944.

That Harry Lutz, the beneficiary named in said policy, was then and is now alive.

IX.

That in and by said application for insurance, copy of which is attached to and made a part of said policy of insurance hereinbefore identified, and the answers therein given in writing [5] before plaintiff's medical examiner, constituting a part of said application, and for the purpose of procuring the issuance of said policy of insurance on his life, and particularly for the purpose of securing the issuance of the policy of insurance identified as policy 1 172 844 of plaintiff company, and with the understanding that plaintiff company would rely and act upon what he therein stated in his said application for said insurance, and the answers to medical examiner made as a part thereof, and with the intent to deceive plaintiff company, said Abe Lutz, in answer to certain of the questions contained in said application for insurance as a part of said policy of insurance, stated as follows:

"35. Have you ever suffered from:

A Indigestion?

Answer: "No."

"B Insomnia?"

Answer: "No."

"C Nervous strain or depression?"

Answer: "No."

"D Overwork?"

Answer: "No."

"E Dizziness or fainting spells?"

Answer: "No."

"F Palpitation of heart?"

Answer: "No."

"G Shortness of breath?"

Answer: "No."

"H Pain or pressure in the chest?"

Answer: "No."

"36 A Have you consulted, or been examined by, a physician or other practitioner within five years?"

Answer: "Yes." [6]

"B If so, give reasons, name of practitioner and details under 44."

"44 Special Information:

36—Dr. Maurice H. Rosenfeld—August, 1942—Physical Examination & Blood Sugar Determination. Report was normal."

That plaintiff company herein incorporates all of the questions and answers made in the said application for said insurance and in particular the questions asked and answers given to the medical examiner as a part of said application for insurance, with the same force and effect as if each and every part thereof were set out herein in full.

That in and by his answers to said questions, hereinbefore particularly alleged, and as contained in said ap-

plication for said insurance, said Abe Lutz falsely and fraudulently represented to plaintiff company that he had never suffered from indigestion, insomnia, nervous strain or depression, overwork, that he had never suffered or experienced any dizziness or fainting spells, that he had never suffered from or experienced any palpitation of the heart, shortness of breath, pain or pressure in the chest. That in and by his answers to said question 36, contained in said application for said insurance, said Abe Lutz falsely and fraudulently represented to plaintiff company that he had not consulted or been treated or examined by any physician or practitioner other than Doctor Maurice H. Rosenfeld, in August, 1942, and for a physical examination and blood sugar determination, with normal result, within five years last preceding the date of said application. That in fact, said Abe Lutz had consulted a physician and been examined by a physician within five years prior to the date of said application and at times other than in August, 1942. and in fact plaintiff company alleges that said Abe Lutz had consulted and been treated by physicians within five [7] years prior to the date of his said application for said insurance, for dizziness and fainting spells, palpitation of the heart, shortness of breath, pain and pressure in the chest, and that he had consulted a physician and been treated by a physician in January, 1937, for nausea and dizziness, in June of 1942 for pains in the chest, in July, 1942, for dizziness and nausea, pains in the chest, indigestion and palpitation of the heart, and for various other ailments and diseases. That said consultations and treatments were all, and each of them was, falsely and fraudulently concealed by said Abe Lutz from plaintiff company for the purpose of inducing plaintiff company to issue to him its policy of life

insurance on his life, and more particularly that certain policy of life insurance numbered 1 172 844, dated as of October 13, 1942, and in the face amount of \$13,000 and on plaintiff company's form 500.

X.

That plaintiff company did not know that said representations contained in the said application for insurance, and that the said answers made to said medical examiner as a part of said application for said insurance, or any of them, were false and untrue. That had plaintiff company known that said representations made by said Abe Lutz were false and untrue or that any of them were false and untrue, or that the answers made by said Abe Lutz to plaintiff company's medical examiner in writing as a part of said application for said insurance and signed by said Abe Lutz were false and untrue, or that any of them were false and untrue, it would not have issued said policy of life insurance herein described and identified. That had plaintiff company known that within one year preceding the date of said application for said insurance, said Abe Lutz had consulted a physician and been treated by a physician for pains in the chest, dizziness, shortness of breath and palpitation of the heart, and had plaintiff known that said Abe Lutz had in fact suffered from dizziness and fainting spells, [8] palpitation of the heart, shortness of breath, pains and pressure in the chest, it would not have issued said policy of life insurance.

That in and by said application for insurance and in and by said answers given before said medical examiner and constituting a part of said application for life insurance, and all as a part of said policy of life insurance herein identified, said Abe Lutz stated, agreed and cer-

tified, on behalf of himself and any person who shall have or claim any interest in any insurance made thereunder, that he had read all and each of the said answers made in said application for said insurance and each of said answers was full and complete and true and that they were, as stated in said application, correctly recorded; that the answers made by said Abe Lutz in his said application for insurance, all as a part of said policy of insurance herein identified, were not full or complete or true, but in that regard plaintiff company alleges that in fact the truth of each of said answers herein particularly identified and described was knowingly, wilfully and fraudulently concealed by said Abe Lutz from plaintiff company for the purpose of inducing it to issue its policy of insurance to him, and particularly the policy of life insurance herein identified and described.

XI.

That plaintiff company, believing all of said answers contained in said application for insurance to be true and complete and correctly recorded, relied and acted thereon and issued its said policy of insurance by reason thereof and not otherwise.

That said policy of life insurance herein identified and described was retained by said Abe Lutz until his death on or about the 28th day of May, 1944. Plaintiff is informed and believes and therefore alleges that since the death of said [9] Abe Lutz said policy has been and is now in the possession of the defendant Harry Lutz, the beneficiary named therein.

XII.

That said policy of life insurance was issued by plaintiff company to and on the life of said Abe Lutz and was

delivered to him without knowledge or notice of plaintiff company that any of the statements or answers contained in the application therefor or in the answers to said medical examiner as a part thereof were false, incomplete, untrue or not correctly recorded, but in reliance thereon and in the belief that said statements and answers and the answers to the medical examiner made as a part of said application for insurance were and each of them was true and complete. That had plaintiff company known or had notice or information that the said statements and answers contained in said application and in said answers to medical examiner as a part thereof were false or untrue or incomplete or not correctly recorded in any respect, or that any of them were false or untrue or incomplete or not properly recorded in any respect, plaintiff would not have issued or delivered said policy of life insurance herein identified and described as its policy number 1 172 844, or would it have issued or delivered any policy of life insurance to said Abe Lutz. That said policy of life insurance was delivered to said Abe Lutz by plaintiff company in the belief that each and all of the statements and answers by said Abe Lutz contained in said application for said insurance and in the answers to said medical examiner as a part thereof were and each of them was true, and in reliance thereon and not otherwise.

XIII.

That after the death of said Abe Lutz, the insured in said policy of insurance, and whose death occurred on or about May 28, 1944, and after the date of receipt by it of proofs of death of said Abe Lutz, plaintiff company for the first time [10] received information leading it to believe that the statements and answers made by said

Abe Lutz in his lifetime and as contained in said application for said insurance and the answers to said medical examiner as a part thereof were not true and were in fact false and untrue, and by reason thereof plaintiff caused an investigation to be made to determine whether said answers were true, as therein set forth and contained, or were false and untrue. That as a result of said investigation and examinations plaintiff company first learned that the representations, statements and answers made in writing by said Abe Lutz in order to secure the issuance and delivery of said policy of life insurance to him were false and untrue and that said Abe Lutz had, prior to the date of said application for said insurance, suffered from, had consulted a physician for, and been examined by a physician for indigestion, dizziness and fainting spells, palpitation of the heart, shortness of the breath and pains and pressure in the chest and had, within approximately one year prior to the date of said application and other than in August, 1942, consulted a physician and been treated by a physician for, and had suffered from each and all of the ailments hereinabove particularly described and alleged.

That promptly thereafter plaintiff company elected to and did rescind said policy of life insurance on account of the misrepresentations and concealments aforesaid and notified defendants of its election to rescind said policy of insurance by letters to defendant Harry Lutz dated September 26 and October 10, 1944. Full, true and correct copies of said letters and notices of rescission dated September 26 and October 10, 1944, from plaintiff company to said defendant are attached hereto, marked herein as Exhibit "A" and by this reference made a part hereof as though set forth herein at length. That at the time of

said notification plaintiff company tendered to defendant Harry Lutz the full amount [11] of the premiums collected by it on account of the issuance of said life insurance policy herein described, together with interest thereon. That said tender was made by plaintiff company in the form of a check payable to the order of defendant Harry Lutz in the sum of \$2523.43, representing premiums received by plaintiff company on policy 1 172 844, together with interest thereon from the date of receipt thereof to the date of said tender. That said amount represented and represents the entire consideration received by plaintiff company for or on account of said policy of life insurance together with interest thereon from the date of the receipt thereof to the date of said tender.

That plaintiff is informed and believes and on such information and belief alleges that defendants, or either or any of them, did not object to the form of said tender but refused and declined to accept said tender and still refuse and decline to accept said tender. That at the time of making said tender plaintiff company offered and now offers to do whatever else it ought to do in the premises for the purpose of rescission of said contract of insurance and for the purpose of restoring the status quo of the parties.

XIV.

That in and by said policy of life insurance, issued and delivered by plaintiff company to Abe Lutz as aforesaid, which said policy plaintiff is informed and believes and therefore alleges is now in the possession of defendant Harry Lutz, it was agreed by plaintiff company that said policy should be incontestable after two years from the date of issuance thereof except for non-payment of

premiums; that a period of two years has not elapsed since the date of issuance of said policy of life insurance herein identified and described, but that said period is about to elapse. That after the expiration of said two years from the date of issue of said policy of insurance, plaintiff [12] company will be prevented by reason of said incontestable clause contained in said policy from asserting its defense of fraud in the procurement of said policy. That no action upon said policy of life insurance has been instituted by defendants against plaintiff or at all. That plaintiff company is apprehensive that if said policy is left outstanding, and that if said policy is not rescinded and cancelled, a suit or suits thereon against plaintiff will be commenced by defendants after the two-year period of contest has expired and plaintiff will be deprived of its right to contest the validity of said policy on account of fraud and misrepresentation of said Abe Lutz or at all except for non-payment of premium, and that plaintiff company will thereby suffer great hardship and irreparable injury in the premises.

XV.

That plaintiff company has no adequate remedy at law. That plaintiff company is apprehensive that if said policy of life insurance is left outstanding, said policy may cause serious injury to it. That said policy is of no force or effect and should be rescinded and cancelled.

XVI.

That the policy of life insurance involved in the within entitled action as part I of the application of Abe Lutz to plaintiff for the issuance of said policy, which said part I is a part of said policy and contract, provides that said policy and the insurance applied for by said application shall not take effect unless and until said applica-

tion is approved by plaintiff and its home office and the first premium is paid while said Abe Lutz is in good health; that said Abe Lutz was not in good health at the time said policy was approved, or at the time said policy was issued, or at the time the first premium thereon was paid, and said policy never took effect or became effective; that said Abe Lutz at the date of the approval of said application and of the [13] issuance of said policy and of the payment of the first premium thereon was suffering from heart trouble, dizziness, fainting spells, palpitation of the heart, shortness of breath, pain and pressure in the chest, nausea, indigestion, and various other ailments.

And for a Second, Separate and Distinct Cause of Action Against Defendants for Declaratory Relief Plaintiff Alleges:

I.

Plaintiff company herein refers to the allegations contained in paragraphs I to XVI, both inclusive, of its first cause of action and incorporates said allegations herein as though set forth herein in full and at length.

II.

That plaintiff is informed and believes and on such information and belief alleges that the defendants Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, claim or will claim that any moneys to be received under said policy of insurance and in rescission thereof are the property of the estate of said decedent, Abe Lutz.

That plaintiff is informed and believes that all of the premiums paid on said policy of insurance in the lifetime of the insured, Abe Lutz, named therein, were paid by the defendant Harry Lutz, but plaintiff cannot ascertain with any certainty whose moneys paid said premiums,

that is, whether the same were paid by the insured, Abe Lutz, or by the defendant Harry Lutz.

That a case of actual controversy exists between plaintiff company and defendants with respect to the rights of defendants and the duties, liabilities and obligations of plaintiff company in and under said policy of life insurance.

III.

Plaintiff is informed and believes and on such [14] information and belief alleges that the defendants contend that plaintiff company is indebted by reason of the death of Abe Lutz, deceased, on or about May 28, 1944, for the payment under said policy of insurance numbered 1 172 844, herein described, of the sum of \$13,000. Plaintiff company contends that by reason of the facts herein alleged, it is indebted for the return of the amounts received as premiums under said policy and interest thereon from the date of receipt to the date of the tender of the return thereof, or the sum of \$2523.43, and that its liability and defendants' rights under said policy are only for a sum equal to the premiums paid to and received by plaintiff company and the interest thereon from the date of receipt to the date of tender and no more. That it cannot be ascertained as to who, legally, is entitled to the return of said last stated amount.

Wherefore, plaintiff company prays for the judgment of this court as follows:

1. That said policy of life insurance issued by plaintiff company to and upon the life of Abe Lutz, deceased, being numbered 1 172 844 and issued under date of October 13, 1942, in the face amount of \$13,000, be rescinded and cancelled and declared to be void and of no force and effect whatsoever.

2. That defendants be required to deliver said policy of life insurance into court for cancellation and that said policy of life insurance be cancelled and declared to be void and of no effect and be delivered up to and into the possession of plaintiff company for cancellation.

3. That defendants be declared to have no rights and that plaintiff company be declared to have no duties, liabilities or obligations under or by virtue of said policy of life insurance except that defendants, or the defendant decreed by this court, are or is entitled to receive, and plaintiff is obligated to pay to whichever of said defendants is decreed by this court entitled [15] thereto, the sum of \$1,099.90, as and being the first premium paid on said policy December 9, 1942, and \$1,199.90, as and being the premium paid October 6, 1943, together with interest thereon at the rate of seven per cent per annum from the date of receipt to the date of the tender thereof.

4. That pending the determination of this action, defendants be restrained, enjoined and prohibited from commencing or prosecuting any suit or action against plaintiff company under or on account of or based upon said policy of life insurance.

5. That plaintiff have such other and further relief as the court in equity and good conscience may deem just and proper.

6. That plaintiff company have judgment for its costs incurred herein.

MESERVE, MUMPER & HUGHES

By Shirley E. Meserve

Attorneys for Plaintiff, New England Mutual Life
Insurance Company of Boston [16]

[Verified. [17]

EXHIBIT "A"

(Letterhead of)

"NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY"

Boston, Massachusetts

Walter Tebbetts
Vice President

501 Boylston Street

September 26, 1944

Mr. Harry Lutz
2500 Santa Fe Avenue
Los Angeles, California

Policy No. 1,172,844—Abe Lutz

Dear Sir:

Under date of October 13, 1942, this company issued its policy No. 1,172,844 on the life of Abe Lutz in the face amount of \$13,000 payable to you or if you did not survive the insured, to your executors, administrators or assigns. You were the applicant for the policy and its sole owner. We are advised that the insured died May 28, 1944.

I regret to inform you that the company has decided to rescind this policy because of the failure of the insured to disclose certain material facts as to his insurability at the time when the policy was issued. On November 16, 1942, the insured appeared before a medical examiner in Los Angeles and in answer to a question whether he had ever suffered from pain or pressure in the chest answered "no". When asked whether he had ever suffered from dizziness or fainting spells, he replied in the negative. He was asked whether he had consulted or been examined by a physician or other practitioner within five

years. He disclosed that he had consulted Doctor Maurice H. Rosenfeld in August, 1942, for a physical examination and blood sugar determination. He stated that the report was "normal".

The insured certified that he had read his answers to these questions, that they were true and complete and that they [18] were correctly recorded. He agreed that the insurance applied for should not take effect unless and until the application was approved by the company at its Home Office and the first premium paid while he was in good health.

The Company believed the foregoing statements and representations to be true and in reliance thereon issued the above-numbered policy.

The company has recently discovered that the aforesaid statements contained in the application for this policy were not true but on the contrary were incomplete and false. It appears that the insured consulted Doctor Rosenfeld in January, 1937, for nausea and dizziness and that a diagnosis of cerebral arteriosclerosis was made. He consulted Doctor Rosenfeld again in June, 1942, for chest pain. The doctor made a tentative diagnosis of mild angina pectoris and prescribed a diabetic regime and nitroglycerin. Further consultations with Doctor Rosenfeld occurred in July and August, 1942.

The company would not have issued this policy had it known these facts. The false answers contained in the application were material to the risk assumed by it.

By reason of the fact that the insured was not in good health when the first premium was paid, this policy never took effect.

In any event the company hereby elects to rescind the policy because of said false and material representations. For the purpose of restoring the status quo, the company is ready and willing to repay to you the amount of the premiums paid on the policy, together with interest thereon at the rate of 7% per annum from the dates of payment.

The above statements are made without prejudice to any other reasons which may exist for the cancellation of said policy.

Very truly yours,

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

By Walter Tebbetts

Vice President" [19]

(Letterhead of)

"MESERVE, MUMPER & HUGHES

October 10, 1944

Mr. Harry Lutz
2500 Santa Fe Avenue
Los Angeles, California

Re: New England Mutual Life Insurance Company,
Boston, Massachusetts, Policy #1 172 844—
Abe Lutz, Insured, Deceased

Dear Sir:

This firm acts as attorneys in this jurisdiction for New England Mutual Life Insurance Company of Boston, Massachusetts, and have referred to us for attention the

matter of the rescission of the indicated policy. You are named in said policy as beneficiary without right of revocation and therefore, we conclude, would be entitled to any of the refund of premiums paid in tender in rescission.

Enclosed herewith you will find a rescission notice, dated September 26, 1944, over the signature of Mr. Walter Tebbets, vice-president of insurer company. Enclosed herewith you will also find this firm's check to your order for the amount of \$2523.43, which amount is calculated to return to you the premiums paid on the policy and interest thereon from the date of payment to the date of this tender. If the amount is incorrect and not properly calculated, we hereby offer to add thereto as a part of said tender such additional amount as shall be required to return all premiums paid on said policy together with interest thereon at seven per cent from the date of payment to the date of tender, and on behalf of said insurer company to do whatever else in the premises that it should do in order to restore the status quo of the parties.

Very truly yours,

MESERVE, MUMPER & HUGHES

By: Shirley E. Meserve."

SEM:DEB

Enc.

Registered

Ret. Rec. Req.

[Endorsed]: Filed Jan. 31, 1945. [20]

[Title of District Court and Cause.]

ANSWER OF HARRY LUTZ AND HARRY LUTZ
AND ROSE LUTZ, AS EXECUTOR AND EXE-
CUTRIX OF THE LAST WILL AND TESTA-
MENT OF ABE LUTZ, DECEASED, TO
AMENDED COMPLAINT OF PLAINTIFF,
AND COUNTERCLAIM OF HARRY LUTZ

Come now defendants Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, and expressly reserve any and all rights to object to the sufficiency of the amended complaint of plaintiff herein, or to attack, move to strike, or dismiss, or move for judgment on the pleadings, or to object to the introduction of any evidence on said complaint, and for answer to the amended complaint of plaintiff, admit, deny, and allege as follows:

Answer to First Cause of Action

I.

Admit the allegations of paragraph I.

II.

Admit the allegations of paragraph II. [21]

III.

Admit the allegations of paragraph III.

IV.

Admit the allegations of paragraph IV.

V.

Answering the allegations of paragraph V admit that on or about the 14th day of November, 1942, Abe Lutz made an application in writing to plaintiff company for

a policy of life insurance on his life; admit that a policy of life insurance was issued by plaintiff company on the life of Abe Lutz; allege that following the death of Abe Lutz the original policy of life insurance on the life of said Abe Lutz was forwarded to and surrendered to plaintiff company, and said policy of life insurance is now and at all times since said surrender has been in the possession of plaintiff company; these defendants, therefore, are not in a position to admit or deny the allegation of said paragraph V that a full, true, and correct copy of said application, together with the answers made to the medical examiner, were attached to and made a part of said policy of life insurance No. 1,172,844 of plaintiff company, and basing their denial upon that ground, deny the same; further answering the allegations of said paragraph defendants are informed and believe, and upon such information and belief allege that Abe Lutz was unable to read and write in English, except in the instance of a few words, such as his name, and that any application signed by Abe Lutz referred to in said paragraph V was not filled in or written by Abe Lutz, but that the same was filled in by Dr. John M. Waste, medical examiner of plaintiff, acting for and in behalf of plaintiff, and Stanley Leeds, soliciting agent for plaintiff company in the procuring of said policy of insurance, and in this connection, defendants further allege that Abe Lutz did not read or know the contents of said application.

VI.

Answering the allegations of paragraph VI, defendants [22] do not have sufficient knowledge or belief to enable them to answer the allegations therein contained, and basing their answer upon that ground, defendants

deny each and every allegation contained in said paragraph VI.

VII.

Answering the allegations of paragraph VII defendants admit that plaintiff company delivered its policy of insurance in the face amount of \$13,000 on the ordinary life plan, and upon its form of policy of life insurance numbered 500; admit that said contract is in writing, and that according to a photostatic copy of the original of said policy of life insurance furnished by counsel for plaintiff company, the number of said policy is 1,172,844; admit that the insured named in said policy is Abe Lutz, and that it is therein provided, among other things, that upon receipt of due proof of death of Abe Lutz, plaintiff company would pay to Harry Lutz, son of the insured, or, if deceased, the executors, administrators, or assigns of said son, the sum of \$13,000; defendants are informed and believe, and upon such information and belief allege that Abe Lutz did not write the information in the application or in the answers to the medical examiner of plaintiff company, and that he did not read, and could not read the same, and did not know the contents thereof, but that Abe Lutz did truly and correctly answer all questions asked him by the medical examiner and by the agent who filled in the application for such policy.

VIII.

Admit the allegations of paragraph VIII.

IX.

Answering the allegations contained in paragraph IX, defendants deny that Abe Lutz had any intent to deceive the plaintiff company, and, further deny that he did any of the acts or things described in paragraph IX with

intent to deceive plaintiff. Defendants admit that, according to a photostatic copy of the application [23] of said Abe Lutz for said policy of life insurance furnished by counsel for plaintiff company that the answers to the questions shown in the application for insurance appear in part as alleged in paragraph IX, but in this connection defendants do not have sufficient information or belief to enable them to answer as to whether said application truly sets forth the answers given by Abe Lutz, and, basing their answer upon this ground, defendants deny that said application accurately sets forth all of the information given by Abe Lutz to the agent and to the medical examiner of plaintiff company; defendants are informed and believe, and therefore allege, that at the time said Abe Lutz was examined by the medical examiner of plaintiff company, further and additional questions other than those appearing on the application were asked, and further and additional answers than those appearing in said application were given in response thereto by Abe Lutz and that said medical examiner of plaintiff company, subsequent to the signing of said application by Abe Lutz, prepared in writing his report of physical findings relative to his examination of said Abe Lutz, and that said report, along with other information as to the physical condition of said Abe Lutz, was considered and acted upon by plaintiff company in the issuance and delivery of said policy of life insurance.

Further answering the allegations contained in paragraph IX, defendants do not have sufficient information or belief to enable them to answer the allegations therein contained which have not been heretofore admitted, qualified, or denied, and basing their answer upon this ground, defendants deny each and every allegation contained in

said paragraph which has not been heretofore admitted or denied herein.

X.

Answering the allegations contained in paragraph X, defendants allege that they do not have sufficient information or belief to enable them to answer the allegations therein contained, and [24] basing their answer upon this ground, defendants deny each and every allegation contained in paragraph X.

XI.

Answering the allegations contained in paragraph XI, defendants admit that the policy of life insurance referred to therein was retained by Abe Lutz until his death on or about the 28th day of May, 1944, and that following said last mentioned date Harry Lutz forwarded said policy together with proof of death to plaintiff, and that plaintiff has the same in its possession.

Further answering the allegations contained in paragraph XI defendants do not have sufficient information or belief to enable them to answer the allegations which have not been hereinabove specifically admitted, qualified, or denied, and basing their answer upon this ground, defendants deny all of the remaining allegations.

XII.

Answering the allegations of paragraph XII, defendants admit that the policy of life insurance was delivered to Abe Lutz, and answering all other allegations contained in said paragraph XII, defendants allege that they do not have sufficient information or belief to enable them to answer any of such other allegations, and, basing their answer upon this ground, defendants deny each and all other allegations contained in said paragraph XII.

XIII.

Answering the allegations contained in paragraph XIII of said complaint, defendants admit the death of Abe Lutz, as alleged in said paragraph XIII, and the receipt by plaintiff of proof of claim of his death. Defendants further admit that letters, copies of which are attached to said complaint, were forwarded by plaintiff as alleged therein, and that the sum of \$2,523.43 represents the premiums received by plaintiff on said policy together with interest from the date of the receipt thereof, and that defendants did not [25] accept the tender and that they still refuse and declined to accept such tender.

Further answering the remaining allegations contained in said paragraph XIII, defendants allege that they do not have sufficient knowledge or belief to enable them to answer the allegations therein contained, which have not been hereinabove specifically admitted, qualified, or denied, and, basing their answer upon this ground, defendants deny all of the remaining allegations of said paragraph XIII.

XIV.

Answering the allegations of paragraph XIV defendants allege that the policy of insurance referred to is in the possession of plaintiff company; that the date of issuance of said policy as appears from a copy of the same furnished by plaintiff company, is October 13, 1942, and as of the date of the filing of plaintiff's amended complaint more than two years have elapsed since the date of issuance of said policy, and that all alleged reasons and grounds for avoidance or rescission of said policy of insurance, not originally asserted as reasons and grounds for avoidance and rescission of said policy in

the original complaint filed herein on October 11, 1944, are waived, and plaintiff company is estopped to assert the same; defendants rely, in that connection, upon the incontestable clause being part and parcel of said policy of insurance, which is as follows, to-wit:

“Incontestable

“This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement attached hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident.” [26]

admit that after the expiration of two years from the date of issue of said policy of insurance plaintiff is prevented by reason of said incontestable clause from asserting its defense of fraud in the procurement of said policy; allege that defendant Harry Lutz on or about December 7th, 1944, filed action herein to recover on said policy of insurance from plaintiff company; defendants do not have sufficient information or belief to enable them to answer the remaining allegations of paragraph XIV, and basing their answer upon that ground, deny all of the remaining allegations of paragraph XIV not herein admitted, qualified, or denied.

XV.

Answering the allegations of paragraph XV, allege that said policy of insurance is in full force and effect, and should not be rescinded and cancelled. Deny all of the remaining allegations of said paragraph XV.

XVI.

Answering the allegations of paragraph XVI, admit that the copy of said policy of insurance furnished by plaintiff company, as aforesaid, contains a provision in substance as alleged in said paragraph XVI, but allege that the reasons and grounds therein in paragraph XVI alleged have been waived by plaintiff, and plaintiff is estopped to assert the same as grounds for avoidance or rescission of said policy of insurance in that more than two years have elapsed since the date of issue of said policy and the filing of said amended complaint; that the original complaint filed by plaintiff on October 11, 1944, did not assert as grounds or reasons for the rescission of said policy of insurance a violation or breach of the provisions of part 1 of the application referred to in said paragraph XVI; deny all of the remaining allegations of said paragraph XVI not herein admitted, qualified, or denied. [27]

Answer to Second Cause of Action

I.

Answering the allegations contained in paragraph I of the second cause of action, defendants reallege and incorporate by reference their answers as given to paragraphs I to XVI, both inclusive, of the first cause of action which paragraphs I to XVI, both inclusive, are realleged by plaintiff in said paragraph I.

II.

Answering the allegations contained in paragraph II of the second cause of action, defendants allege that the premiums on the insurance policy referred to therein were paid by defendant Harry Lutz, and defendants further allege that said defendant procured and obtained the said

insurance policy on the life of his father, Abe Lutz, for the sole benefit of defendant Harry Lutz, and that the said defendant procured and obtained the said insurance policy in good faith, and has at all times believed that the same was valid and that the proceeds of said insurance policy would be paid to defendant Harry Lutz at the time of the decease of his father, Abe Lutz.

Further answering the allegations contained in paragraph II, defendants deny each and every allegation therein contained which has not been hereinabove specifically admitted or denied.

III.

Answering the allegations contained in paragraph III of the second cause of action, defendants contend that the plaintiff is indebted to Harry Lutz in the sum of \$13,000, together with interest on said sum from May 8, 1944, and defendants deny each and every other allegation contained in said paragraph III. [28]

Affirmative Defense—Estoppel

I.

Defendant Harry Lutz procured and obtained the policy of life insurance described in plaintiff's complaint in good faith and without any intention to defraud or mislead plaintiff, and said defendant has paid all premiums on the said policy as alleged in plaintiff's complaint, believing that the said insurance policy was valid and enforceable, and that the proceeds thereof would be paid to Harry Lutz immediately following the decease of Abe Lutz. Defendants are informed and believe, and upon such information and belief allege that Abe Lutz furnished the agents and representatives of plaintiff with full, true and correct information on all matters as to which in-

formation was requested by said agents and representatives, and that Abe Lutz did not falsify or conceal any matter or fact concerning which he was interrogated.

II.

Prior to the time that said insurance policy was signed and delivered by plaintiff, plaintiff's physician and medical examiner examined Abe Lutz and determined from said examination that the health and physical condition of Abe Lutz merited and warranted the issuance of such insurance policy, and plaintiff's representatives contacted the physician of Abe Lutz and obtained and had the opportunity of obtaining full, true and correct information from such physician regarding the physical condition and health of Abe Lutz; that defendant Harry Lutz and Abe Lutz caused to be cancelled other insurance policies in existence on the life of Abe Lutz, believing that the said insurance policy described in plaintiff's complaint was valid and that the proceeds thereof would be paid at the time of the decease of Abe Lutz, and defendants are informed and believe, and upon such information and belief allege that plaintiff knew that such other insurance policies were cancelled and that the insurance policy described in plaintiff's complaint was taken [29] out in lieu and in place of the said other insurance policies by defendant Harry Lutz and Abe Lutz, and that said two last named parties believed that the said policy would be paid at the time of the decease of Abe Lutz. That in the event that there was any physical condition existing which would have justified the refusal of said policy, plaintiff had ample opportunity to ascertain the same and to acquaint itself with the full facts regarding the same; that by reason of the facts alleged under this defense, plaintiff is estopped to rescind or cancel the said policy or to refuse

the payment of the proceeds therefrom, and is further precluded from relief by reason of its delay in waiting until the decease of Abe Lutz before attempting to rescind or cancel the said insurance policy.

Affirmative Defense—Waiver

I.

Defendant Harry Lutz procured and obtained the policy of life insurance described in plaintiff's complaint in good faith and without any intention to defraud or mislead plaintiff, and said defendant has paid all premiums on the said policy as alleged in plaintiff's complaint, believing that the said insurance policy was valid and enforceable, and that the proceeds thereof would be paid to Harry Lutz immediately following the decease of Abe Lutz. Defendants are informed and believe, and upon such information and belief allege that Abe Lutz furnished the agents and representatives of plaintiff with full, true and correct information on all matters as to which information was requested by said agents and representatives, and that Abe Lutz did not falsify or conceal any matter or fact concerning which he was interrogated.

II.

Prior to the time that said insurance policy was issued by plaintiff, plaintiff's physician and medical examiner [30] examined Abe Lutz and determined from said examination that the health and physical condition of Abe Lutz merited and warranted the issuance of such insurance policy, and plaintiff's representatives contacted the physician of Abe Lutz and obtained and had the opportunity of obtaining all information from such physician regarding the physical condition and health of Abe Lutz which plaintiff deemed necessary; that at the time of the mak-

ing and signing of application for insurance by Abe Lutz, said Abe Lutz informed plaintiff's medical examiner and agent that Dr. Maurice H. Rosenfeld, of Los Angeles, California, was his family and attending physician, and had given him a complete physical examination, including, but not limited to, blood sugar tests; that the medical examiner of plaintiff thereupon inserted in writing the name of Dr. Maurice H. Rosenfeld, and recorded the fact that said Abe Lutz had undergone a physical examination and blood sugar determination test at the office of said Dr. Maurice H. Rosenfeld; that following the examination of Abe Lutz by plaintiff's medical examiner, in addition to the information obtained by said medical examiner, and the recording of so much of the information given by said Lutz as was deemed material by said medical examiner, said medical examiner made a thorough and complete examination of Abe Lutz, including tests of all the matters concerning which plaintiff company now claims to have been misled, or concerning which information was withheld, and a written report of the physical findings of said medical examiner were forwarded by said medical examiner to the Home Office of plaintiff company at Boston, Massachusetts; that in furnishing plaintiff company, through its medical examiner and agent, with the name of the family and attending physician of said Abe Lutz, plaintiff company had placed at its disposal the exact source from which it could obtain the information which it now maintains, by virtue of the amended complaint filed herein, was withheld from it; that notwithstanding the foregoing information given by Abe Lutz to plaintiff, [31] plaintiff company either made no investigation, or an insufficient investigation, when it could or should have, and thereupon issued the policy of insurance hereinbefore referred to, and received and kept all

of the premiums paid thereon until after the death of said Abe Lutz; that by reason of the foregoing, plaintiff company, under the provisions of Secs. 333, 334, 335, and 336 of the Insurance Code of the State of California, has waived all of the matters, facts, and things concerning which it now claims to have been misled or concerning which information was concealed, and withheld from it, by said Abe Lutz.

Third Defense—Incontestable Clause

I.

That the matters set up and alleged in paragraph XVI of plaintiff's first cause of action, and Paragraph XVI incorporated by reference in plaintiff's second cause of action, are barred by the provisions of the policy of life insurance referred to in plaintiff's amended complaint numbered 1,172,844, and particularly that provision contained in said policy in words and figures as follows:

"Incontestable

"This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement attached hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident."

In connection with the foregoing, defendants allege that the date of issue of said policy was October 13, 1942; that the matters set up and alleged in paragraph XVI, as afore-

said, were not asserted as a ground for rescission of said policy of insurance until after the lapse of more than two years from the date of issue of said policy, [32] said amended complaint, which for the first time contained the matter set up and alleged in paragraph XVI, as aforesaid, having been filed herein on or about January 31, 1945.

COUNTERCLAIM

Comes now defendant, Harry Lutz, and for a counterclaim against the New England Mutual Life Insurance Company of Boston, a corporation, states and alleges as follows:

I.

That the New England Mutual Life Insurance Company of Boston, is now, and has been at all times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, and engaged in and duly authorized by the laws of the State of California to engage in the business of life insurance in said State of California.

II.

That the amount in controversy herein exceeds the sum of \$3,000, exclusive of interest and costs. The jurisdiction of this court depends upon diversity of citizenship and upon the fact that the amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs. The within action is a controversy between citizens of different states, to-wit: Harry Lutz, who is now and

has been at all times herein mentioned a citizen, resident, and inhabitant of the State of California, and plaintiff who is now, and has been at all times herein mentioned a citizen, resident, and inhabitant of the State of Massachusetts. That Harry Lutz is now and has been at all times herein mentioned residing within the Central Division of the Southern District of California of the above entitled court.

III.

That Harry Lutz is the son of Abe Lutz, now deceased, and the beneficiary named in policy No. 1,172,844, issued by plain- [33] tiff company on the life of Abe Lutz.

IV.

That on or about the 13th day of October, 1942, in consideration of the payment of the premium of \$1099.90, for the period commencing October 13, 1942, to and including September 13, 1943, and the further sum of \$1,199.90 annually thereafter, the plaintiff company, by its agents duly authorized thereto, executed its policy of insurance No. 1,172,844 in writing upon the life of Abe Lutz in the sum of \$13,000; that plaintiff company has in its possession the original policy of insurance; that there is attached hereto, here referred to, marked Exhibit "A" and made a part of this complaint a photostatic copy of said policy of insurance, the original of which Harry Lutz will rely upon at the time of trial; that under and by virtue of the terms of said policy of life insurance, plaintiff company agreed in writing, among

other things, to pay to Harry Lutz, son of Abe Lutz, or if said son should be deceased, to the executors, administrators, or assigns of said son, the sum of \$13,000 following the decease of Abe Lutz and the filing of proof of death of said Abe Lutz; that on the 28th day of May, 1944, the said Abe Lutz died in the City of Los Angeles, State of California.

V.

That up to the time of the death of said Abe Lutz all premiums accrued on said policy were fully paid.

VI.

That the said Abe Lutz performed each and all of the conditions of said policy of insurance on his part to be performed.

VII.

That the said Harry Lutz has performed each and all of the conditions of said policy of insurance on his part to be performed. [34]

VIII.

That prior to the commencement of this action notice and proofs of death of said Abe Lutz were given to plaintiff company, and demand was made upon plaintiff company for the payment of said sum of \$13,000.

IX.

That said sum of \$13,000 has not been paid nor any part thereof and the same is now due from plaintiff company to Harry Lutz, counterclaimant herein.

Wherefore, defendants pray as follows:

(1) That plaintiff take nothing by reason of the filing of its amended complaint herein, and that defendants Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, be awarded their costs and such other and further relief as to the court may seem just and proper.

(2) That counterclaimant be awarded judgment against New England Mutual Life Insurance Company of Boston, a corporation, for the sum of \$13,000, together with interest thereon at the rate of 7% per annum from May 28, 1944, until paid, for costs and for such other and further relief as to the court may seem just and equitable.

McLAUGHLIN & McGINLEY

By John P. McGinley

Attorneys for Defendants and Cross-
Claimant. [35]

[EXHIBIT "A"]

NEW ENGLAND MUTUAL



Life Insurance Company OF BOSTON

COPY

Agrees to Pay

at its Home Office in Boston, Massachusetts, on receipt of due proof of the death of the

INSURED ARE LUTZ the

FACE AMOUNT *** THIRTEEN THOUSAND *** DOLLARS, to the

BENEFICIARY, HARRY LUTZ, son of the Insured, or if deceased, the executors,
administrators or assigns of said son, the sole Owner of this Policy.

The Beneficiary is appointed without right of revocation, by the Insured.

This Policy is issued in consideration of the application and of the

ANNUAL PREMIUM OF *** ELEVEN HUNDRED NINETY NINE AND 90/100 *** DOLLARS,

to be paid in advance as herein specified, and of a like premium to be paid on or before the

thirtieth day of October in each year thereafter during the life of the Insured.

The provisions hereinafter set forth are hereby made a part of this contract.

The effective date for the calculation of non-forfeiture values and dividends

is October 13, 1942 and each policy year shall begin with this date or its anniversary.

In WITNESS WHEREOF, the NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY has caused
 this contract to be executed at Boston, Massachusetts, on its date of issue, October 13, 1942

Morris P. Cohen Secretary

George Willard Smith President

B. R. Downing Registrar

TRUE COPY AS OF September 26, 1944

Policy Number 1,172,844

ATTEST

1 copy 5 pages

ASSISTANT SECRETARY
 Age at Issue 64

Life Policy

Annual Return of Surplus

Premiums Payable during Life, unless Dividends are Applied to Shorten Premium Paying Period
 Cash Value May be Used to Provide Retirement Income

With War and Amalgam Agreement

(Exhibit A)

Endorsements

To be made only by the Company at its Home Office

WAR AND AVIATION AGREEMENT

This Policy is issued on the express condition that the Company does not assume the risk of death under any of the following circumstances, notwithstanding any contrary provision contained in the Policy:

- (a) death from any cause, while the Insured is in service outside the forty-eight states of the United States, the District of Columbia and the Dominion of Canada, in the military, naval or air forces of any country at war, declared or undeclared; or death within six months after termination of such service, as a result of injuries incurred or disease contracted during such service;
- (b) death within two years of the date of issue of this Policy, from injuries incurred or disease contracted outside the forty-eight states of the United States, the District of Columbia and the Dominion of Canada, as a result of war, or any incident thereof;
- (c) death as a result of travel or flight in, or descent from, any kind of aircraft, in any capacity except as a fare-paying passenger on a regularly scheduled passenger flight of a licensed common carrier.

In event of any such death, the liability of the Company under this Policy and under any Double Indemnity Agreement, or under any paid-up or extended insurance, or under any Policy issued in exchange for this Policy, shall be limited to (a) premiums paid to the Company, less all dividends credited in any manner, with interest at three per cent per annum, or (b) the reserve on this Policy, whichever is greater; increased in either case by the reserve for any additions and accumulated surplus, and decreased by any indebtedness which has not been repaid in cash, and by any amount allowed as a credit in connection with a change or reduction. If, no event shall the liability of the Company exceed the amount which would be payable if this Agreement were not in effect.

The Incontestable provision of the Policy is amended by adding the following words: *and except as to any provision of the War and Aviation Agreement.*

Endorsed on Date of Issue of Policy

P-491 Feb-42

In consideration of the payment in advance as herein specified, of a pro rata premium of \$ 1099.90 for insurance to Sept. 15, 1943, it is hereby agreed that the annual premiums shall be payable Sept. 15th instead of Oct. 15th; but this endorsement shall not affect policy provisions defining policy years and adjustment of the premium for the policy year in which the insured dies.

PR-1

ENDORSED on Date of Issue of Policy

Morris P. Capen
Secretary

Register of Changes in Beneficiary and Ownership

If any endorsement is made below by the Company at its Home Office, the Beneficiary and Ownership of this Policy shall be in accordance with the request referred to in the latest endorsement; the original of such request being filed with the Company and a copy attached to this Policy.

[illegible]

(Exhibit A)

Benefits and General Provisions

Premiums

Premiums are payable at the Home Office, or they may be paid to an agent of the Company only upon delivery of a receipt signed by a Secretary or an Assistant Secretary and countersigned by a General Agent or Manager. Premiums are due annually in advance, but may be paid semi-annually or quarterly at the Company's rates effective at time of issue, or in such other manner as may be agreed upon with the Company. Any amount of premium paid for a period beyond the policy year in which the Insured dies shall be paid in one sum to the person entitled to receive the policy proceeds upon the death of the Insured, or for whose immediate benefit such proceeds are then being applied. In case of failure to pay any premium when due or during the period of grace, this Policy shall cease to be in force except for such values, if any, as are provided by the Non-forfeiture and Loan Provisions.

GRACE. Any premium not paid on or before its due date will be in default; but a grace period of thirty-one days, without interest, will be allowed for payment of every premium after the first, during which period the insurance shall continue in force.

REINSTATEMENT. This Policy may be reinstated at any time, unless the Policy has been surrendered for its cash value, upon production of evidence of insurability satisfactory to the Company, the payment or reinstatement of any indebtedness to the Company, and the payment of all overdue and unpaid premiums, with interest on such indebtedness and premiums at five per cent per annum, compounded annually.

Proceeds Payable

Payments by the Company under this Policy shall be made at the Home Office. The Company has the right to require surrender of the Policy at the time of claim. The proceeds payable at death shall be the face amount, increased by any additions, accumulated surplus and unpaid share of surplus, and reduced by any indebtedness to the Company on or secured by this Policy, and by any amount of unpaid premium for the policy year in which the Insured dies, even if death occurs within the grace period.

Dividends

Upon payment of the second annual premium, and annually thereafter while in force prior to maturity, this Policy shall be credited with such share of surplus as may be apportioned by the Company. Each share of surplus, or dividend, at the option of the Owner, shall be (A) payable in cash; or (B) applied in reduction of premium; or (C) used to purchase a participating paid-up addition, unless the Policy is in force as extended insurance, which addition may be surrendered for a cash value not less than the dividend; or (D) left with the Company to accumulate, with interest at not less than two and one-half per cent per annum, and payable at maturity or expiry or on demand. Any election in the application or by subsequent request shall be effective until another election is made, but if no election is in effect, the share of surplus for any year will be held by the Company at interest, as provided in D. If any premium remains unpaid at the expiration of the grace period, the Company shall apply to the payment then due the accumulated surplus under D, if sufficient to make said payment in full. If this Policy becomes a claim by death after the first policy year, a post-mortem share of surplus shall be paid.

PAID-UP OR ENDOWMENT PRIVILEGE. When the cash value of this Policy and of any additions and accumulated surplus equals the reserve of a paid-up policy of the same form and amount at the then attained age of the Insured, upon written request and release of additions and accumulated surplus, this Policy shall be endorsed as fully paid-up; or when such aggregate value equals the face amount of this Policy, upon written request and release, the net cash value shall be paid as an endowment.

Ownership and Beneficiary Provisions

The Insured, if all Beneficiaries are appointed with the right of revocation, or jointly with all Beneficiaries appointed without right of revocation, is the Owner of this Policy, unless otherwise provided. Such ownership shall be subject to any assignment on file at the Home Office of the Company. The Owner has the right,

prior to maturity of the Policy by death or as an endowment, from time to time, to change the Beneficiary and the provisions governing control of the Policy; assign the Policy as collateral security, or exercise any right, option or benefit contained in the Policy or permitted by the Company; and the rights of any Beneficiary shall be subject to any interest so created. Every request for change of Beneficiary must be in written form satisfactory to the Company, and shall take effect as of the date of such request, but only when endorsed hereon by the Company, whether or not the Insured be living at the time of endorsement; provided that any interest so created shall be subject to any action taken or payment made by the Company prior to such endorsement. If no Beneficiary survives the Insured, the proceeds shall be payable to the executors, administrators or assigns of the Insured, unless otherwise provided.

Change of Plan

This Policy, while in full force, may be exchanged, subject to the following provisions, for any form of Life or Endowment Policy, of the same face amount, written by the Company at the time of exchange. The new Policy will be issued as of the date and age specified in this Policy, and will be subject to any indebtedness to the Company on or secured by this Policy, and to any assignment on file at the Home Office of the Company. Change to a Policy with a higher premium rate will be made without evidence of insurability, upon payment of the difference between the reserves of the respective policies. Change to a Policy with a lower premium rate will be made upon evidence of insurability satisfactory to the Company, with adjustment of the difference between the cash value of this Policy and the reserve of the new Policy. Change may be made only with the consent of the Company if any premium has been waived under a disability provision, or if the new Policy shall: (a) involve any other life; or (b) increase the amount payable in event of death; or (c) include any disability or accidental death provision which is not a part of this Policy; or (d) require less than ten annual premiums payable after the date of exchange.

Assignments

No assignment of this Policy shall be binding on the Company unless in writing and until the original, or a duplicate thereof, is filed at the Home Office. Assignments shall be subject to any indebtedness to the Company on or secured by this Policy. No responsibility for the validity of assignments will be assumed by the Company.

Incontestable

This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement attached hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident.

Amended, see War and Aviation Agreement

AGE. If the age of the Insured has been misstated, the amount payable shall be that which the premium for this Policy would have purchased at the rate for the correct age.

SUICIDE. If the Insured, whether sane or insane, shall die by his or her own hand or act within two years from the date of issue of this Policy, the liability of the Company under this Policy shall be limited to the payment in one sum of the amount of premiums paid, less any indebtedness to the Company.

Contract

This Policy and the application, a copy of which is attached to and made a part of this Policy, constitute the entire contract between the parties. All statements made by the Insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties; and no such statement shall be used in defense to a claim unless contained in the application and unless a copy of such application is attached to this Policy when issued. No endorsement or alteration of this Policy and no waiver of any of its provisions shall be valid unless made in writing by the Company and signed by its President, Vice-President, Secretary, Assistant Secretary or Registrar; and no other person shall have authority to bind the Company in any manner.

(Exhibit A)

Values of Policy

Loan Provisions

At any time after the first policy year, prior to maturity, while this Policy is in force except as extended insurance, on receipt of the loan agreement duly assigning the Policy, the Company will loan on the sole security of the Policy and of any additions, any amount which, with interest, shall not exceed the value of the Policy and of any additions at the end of the policy year in which such loan is made. Any existing indebtedness to the Company on or secured by this Policy and any unpaid premium for the then current policy year shall be deducted from the loan value. The Company may require delivery of the Policy at its Home Office before making such loan. The Company may defer the making of any loan, other than to pay premiums on policies in the Company, for not more than six months from date of application therefor, or for any shorter period prescribed by law.

If an automatic premium loan agreement is in effect, the amount of each premium which thereafter remains unpaid at the end of the grace period shall be charged against the Policy as a loan, provided the entire indebtedness on the Policy, with interest, shall not exceed the value of the Policy and of any additions on the next premium due date. Before the automatic premium loan provision shall be in effect, the agreement, duly assigning the Policy, must be filed with the Company at its Home Office; and the Company may require delivery of the Policy at its Home Office for endorsement. This provision shall not be applicable for settlement of less than a quarterly premium.

Loans shall bear interest at a rate equivalent to five per cent at the end of the year, payable on the dates specified in the loan agreement. Interest not paid when due shall be added to the amount of the loan and bear interest.

Loans may be repaid, in whole or in part, at any time prior to maturity, while the Policy is in force, unless meanwhile a non-forfeiture option has become operative. Failure to repay any loan or to pay interest shall terminate the insurance only when the total indebtedness equals or exceeds the loan value and thirty-one days after notice has been mailed to the last known address of the Insured.

Non-Forfeiture Provisions

The reserve on this Policy is computed by the full level premium method on the American Experience Table of Mortality and three per cent interest. The values at the end of the third and subsequent years are equivalent to the full reserve; the values for the end of the second year are equivalent to the full reserve reduced by one-half of one per cent of the face amount of the Policy.

After the Policy has been in full force for two policy years, and prior to maturity, any one of the following non-forfeiture options will be available:

EXTENDED INSURANCE. Participating term insurance, continued from the due date of the premium in default, for the face amount of the Policy and of any additions, less the amount of any indebtedness to the Company on or secured by this Policy. The term of the extended insurance shall be such as the net cash value will purchase as a net single premium. Extended insurance shall have cash values equal to the full reserve thereon, but no loan value.

PAID-UP INSURANCE. Participating paid-up insurance, payable at the same time and on the same conditions as this Policy. The amount of the paid-up Policy shall be such as the net cash value will purchase as a net single premium. Paid-up insurance shall have cash and loan values equal to the full reserve thereon, less any indebtedness.

CASH VALUE. The net cash value, which shall be the value of the Policy and of any additions and accumulated surplus, less any indebtedness to the Company on or secured by this Policy, payable on surrender of the Policy. Cash values will be available at the end of a policy year, or during a grace period, or with the consent of the Company at other times. The Company may defer payment of any cash value for not more than six months from date of application therefor, or for any shorter period prescribed by law.

ELECTION OF OPTION. Any election, in the application or in writing filed with the Company at its Home Office, in effect at the end of the grace period for the payment of the premium in default, shall determine whether the extended insurance or the paid-up insurance provision is binding. If no election is in effect, the extended insurance provision shall be binding. The extended insurance and paid-up insurance options shall not become automatically operative so long as the premium due may be paid by accumulated surplus or under the terms of an automatic premium loan agreement then in effect.

The following table shows the values at the end of certain policy years, provided all premiums due during the years indicated have been paid, and provided the Policy is free from indebtedness to the Company and is without additions or accumulated surplus. If in any policy year after the second the premium for a part of a year is paid, the cash value for the end of the preceding year shall be increased by a proportionate part of the increase in the cash value for the then current year.

After Policy has been in Force for Number of Policy Years Indicated	Participating Extended Insurance		FOR EACH \$1000 OF FACE AMOUNT		After Policy has been in Force for Number of Policy Years Indicated	Participating Extended Insurance		FOR EACH \$1000 OF FACE AMOUNT	
	Years	Days	Participating Paid-up Insurance	Cash or Loan* Value		Years	Days	Participating Paid-up Insurance	Cash or Loan* Value
2 Years	1	252	\$ 93	\$ 72.07	14 Years	4	291	\$570	\$435.26
3 "	2	171	154	114.90	15 "	4	278	599	515.47
4 "	3	2	201	152.14	16 "	4	255	627	545.22
5 "	3	161	246	189.71	17 "	4	223	654	574.27
6 "	3	288	289	224.55	18 "	4	179	681	602.67
7 "	4	27	330	259.59	19 "	4	122	706	630.55
8 "	4	113	369	293.73	20 "	4	43	730	658.19
9 "	4	180	406	327.19	21 "	3	333	754	685.70
10 "	4	231	441	359.97	22 "	3	257	777	712.82
11 "	4	267	475	391.95	23 "	3	172	799	739.03
12 "	4	288	503	423.49	24 "	3	70	820	763.90
13 "	4	296	539	451.50	25 "	2	323	830	787.27

G.L. 864

Values for other years will be furnished upon request. *See "Loan Provisions."

(Exhibit A)

Options of Payment

The whole or part of the proceeds payable at maturity of this Policy by death or as an endowment, or of the net cash value payable on surrender, may be made payable as hereinafter provided in accordance with one of the first five Options, or in such manner as may be mutually agreed upon with the Company. The procedure governing change of beneficiary shall apply to any election or change of election of an Option prior to maturity. Any election of an Option may not be changed after the Option becomes operative, except as provided in the election. If no election is in effect at maturity, the Payee entitled to the proceeds may then make an election for such Payee's own benefit.

FIRST OPTION. Monthly instalments certain for a definite number of years, not exceeding thirty.

SECOND OPTION. Monthly instalments based on the sex of the Payee, and on the age when this Option becomes operative. Payments shall be made only during the life of the Payee, or with a guarantee of instalments certain for ten or twenty years and thereafter during the life of the Payee, as may have been elected.

THIRD OPTION. Monthly instalments based on the sex of the Payee, and on the age when this Option becomes operative. Payments shall be made during the life of the Payee. Upon receipt of due proof of death of the Payee before the sum of the instalments-paid equals the amount applied to this Option, a sum equal to the difference shall be paid.

FOURTH OPTION. Monthly interest payments at the rate of \$2.06 for each One Thousand Dollars of the amount applied to this Option, commencing one month after this Option becomes operative and continuing during the life of the Payee, or such other period as may be mutually agreed upon with the Company. This interest is the equivalent of two and one-half per cent at the end of the year. At the decease of the Payee or at the end of the period agreed upon, the amount then retained, with any accrued interest, shall be paid in one sum, unless otherwise provided.

FIFTH OPTION. Instalments of such amounts, commencing at such time and payable at such periods, as may be agreed upon with the Company, and continuing until the amount applied to this Option, with interest and dividends as hereinafter provided, is exhausted. The final instalment will be for the balance only.

SIXTH OPTION. If this Policy is surrendered at the end of the policy year when the attained age of the Insured at nearest birthday is 55, 60 or 65 years, the net cash value may be made payable in monthly instalments during the joint lifetime of the Insured and one other Payee then at least twenty-five years of age, two-thirds of such monthly income to be continued during the after lifetime of the survivor of such Payees. The monthly instalments will be based on the sex of such Payees, and on their ages when this Option becomes operative.

The first payment under the First, Second, Third or Sixth Option shall be payable when the Option becomes operative,

and each payment shall be according to the table for that Option. Quarterly, semi-annual or annual instalments may be provided at the time of election of any Option, in lieu of the monthly instalments.

The Options shall be available only with the consent of the Company, if the amount applicable thereto be less than One Thousand Dollars, or if payments under the Option are to be made to a corporation, partnership, association or fiduciary, or if the Policy is assigned other than to the Company. The Company may at its option change the period of payment to quarterly, semi-annual or annual, if necessary to bring the amount of each periodic guaranteed payment to at least Ten Dollars.

DIVIDENDS. These Options shall be credited with such shares of surplus as may be apportioned by the Company, but in the case of the Second and Third Options any such shares of surplus will be apportioned only during the certain or refund period. The Second Option without instalments certain and the Sixth Option will not participate in surplus distribution. Any shares of surplus under the First, Second, Third or Fourth Option shall be paid in instalments with the guaranteed payments. Any share of surplus under the Fifth Option shall be added each year to the unpaid balance.

FINAL PAYMENT. At the decease of any Payee after the Option elected becomes operative, the then present value of any unpaid instalments certain under the First or Second Option, commuted on the basis of interest specified for that Option, or any amount due under the provisions of the Third Option, or any principal amount and accrued interest then remaining unpaid under the Fourth or Fifth Option, shall be paid in one sum to the executors or administrators of such Payee, unless otherwise provided. The liability of the Company shall terminate with the last payment due prior to the decease of the Payee after the certain or refund period under the Second or Third Option, or of the Payee under the Second Option without instalments certain, or of the surviving Payee under the Sixth Option.

BASIS OF PAYMENTS. The reserve for the Second, Third and Sixth Options is based on the Standard Annuity Table of Mortality with interest at three per cent per annum. The Company shall pay interest at a rate equivalent to two and one-half per cent at the end of each year on any balance from time to time remaining with the Company under the First, Fourth or Fifth Option, and such unpaid balance shall constitute indebtedness of the Company. The amount of each guaranteed payment under the First, Second, Third and Fourth Options, or the amount of each periodic payment under the Fifth Option, includes such interest.

ANTICIPATION OR ALIENATION. Unless otherwise provided in the election of the Option, no Payee shall have any right to assign, alienate, anticipate or commute any instalments or payments, to make withdrawals of proceeds, or to make any change in the provisions elected; and, except as otherwise prescribed by law, no payment of interest or of principal shall be subject to the debts, contracts or engagements of any Payee, nor to any judicial process to levy upon or attach the same for the payment thereof.

The tables for the Options are printed on the following page.

The First Mutual Life Insurance Company Chartered in America

For Insurance on the Life of

Abe Lutz

(This name clearly is a third name in the Fellowship)

It is hereby Agreed that this Application, including Part II, a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued hereon, that acceptance of a Policy shall constitute ratification of any and all changes noted by the Company under "Additions, Alterations, Amendments," and that the insurance applied for shall not take effect until the Application is approved by the Company, and until the first premium is paid. If the first premium is not paid within the time specified in the Policy, the insurance shall terminate. If the first premium is not paid within the time specified in the Policy, the insurance shall terminate. If the first premium is not paid within the time specified in the Policy, the insurance shall terminate.

Signed in my presence this 14 day of Nov. 1942 Always
Stanley E. Leeds Agent Broker Harry [Signature] Applicant for Insurance
 One copy of this certificate must be filed with the Department of Insurance and the Department of Labor.

Part II — Application to the New England Mutual Life Insurance Company

[illegible]

and at Los Angeles in my presence
 on the day of November 19 1912
John H. H. 2016 [Signature] [Stamp] [Stamp] [Stamp]
 [Signature] [Stamp] [Stamp] [Stamp]

be lawful, on school or hospital, or any premises, that shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired, and I authorize the any such disclosure.

Statement of _____

(Exhibit A)

First Option—Monthly Instalments for Each \$1,000 Applied to Provide Income

Years	Instalment	Years	Instalment	Years	Instalment	Years	Instalment	Years	Instalment
1	\$84.28	6	\$14.93	11	\$8.64	16	\$6.30	21	\$5.08
2	42.66	7	12.95	12	8.02	17	6.00	22	4.90
3	28.79	8	11.47	13	7.49	18	5.73	23	4.74
4	21.86	9	10.32	14	7.03	19	5.49	24	4.60
5	17.70	10	9.39	15	6.64	20	5.27	25	4.46
								26	\$4.34
								27	4.22
								28	4.13
								29	4.02
								30	3.93

Second and Third Options—Monthly Instalments for Each \$1,000 Applied to Provide Income
Guaranteed as long as Payee lives

Age of Payee		SECOND OPTION				Age of Payee		THIRD OPTION				Age of Payee		THIRD OPTION			
Married Birthday		Life Annuity		Instalments 10 years		Married Birthday		Life Annuity		Instalments 10 years		Married Birthday		Life Annuity		Instalments 10 years	
Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
under 6	under 11	\$2.96	\$2.95	\$2.94	\$2.92	30	35	\$5.57	\$5.56	\$5.51	\$5.46	55	60	\$5.50	\$5.28	\$4.75	\$4.62
6	11	2.97	2.96	2.95	2.93	31	36	5.61	5.60	5.54	5.49	56	61	5.63	5.39	4.79	4.91
7	12	2.99	2.98	2.96	2.94	32	37	5.66	5.64	5.58	5.53	57	62	5.78	5.51	4.84	5.00
8	13	3.00	2.99	2.98	2.95	33	38	5.70	5.68	5.62	5.56	58	63	5.93	5.63	4.90	5.10
9	14	3.02	3.01	2.99	2.97	34	39	5.75	5.73	5.66	5.60	59	64	6.09	5.75	4.95	5.19
10	15	3.03	3.02	3.01	2.99	35	40	5.80	5.78	5.70	5.64	60	65	6.26	5.88	5.00	5.20
11	16	3.05	3.04	3.03	3.00	36	41	5.85	5.83	5.74	5.68	61	66	6.44	6.01	5.05	5.41
12	17	3.06	3.05	3.04	3.02	37	42	5.91	5.88	5.79	5.72	62	67	6.63	6.14	5.10	5.52
13	18	3.08	3.07	3.06	3.04	38	43	5.97	5.93	5.83	5.77	63	68	6.83	6.28	5.14	5.64
14	19	3.10	3.09	3.08	3.06	39	44	6.02	5.99	5.87	5.81	64	69	7.05	6.42	5.19	5.76
15	20	3.12	3.11	3.10	3.07	40	45	6.09	6.05	5.92	5.86	65	70	7.27	6.57	5.23*	5.89
16	21	3.14	3.13	3.12	3.09	41	46	6.15	6.11	5.97	5.91	66	71	7.51	6.72	...	6.03
17	22	3.17	3.16	3.14	3.11	42	47	6.22	6.17	6.02	5.96	67	72	7.76	6.86	...	6.16
18	23	3.19	3.18	3.17	3.14	43	48	6.29	6.24	6.07	6.01	68	73	8.03	7.02	...	6.31
19	24	3.22	3.20	3.19	3.16	44	49	6.37	6.31	6.12	6.06	69	74	8.32	7.17	...	6.47
20	25	3.24	3.23	3.21	3.18	45	50	6.45	6.38	6.17	6.12	70	75	8.62	7.33	...	6.63
21	26	3.27	3.26	3.24	3.20	46	51	6.53	6.45	6.23	6.18	71	76	8.94	7.48	...	6.79
22	27	3.30	3.28	3.26	3.23	47	52	6.62	6.53	6.28	6.24	72	77	9.28	7.63	...	6.90
23	28	3.33	3.31	3.29	3.25	48	53	6.71	6.61	6.33	6.30	73	78	9.64	7.78	...	7.16
24	29	3.36	3.34	3.32	3.28	49	54	6.81	6.70	6.39	6.37	74	79	10.03	7.94	...	7.38
25	30	3.39	3.38	3.35	3.31	50	55	6.91	6.79	6.45	6.44	75	80	10.44	8.08	...	7.55
26	31	3.42	3.41	3.38	3.34	51	56	7.01	6.88	6.50	6.51	76	81	10.88	8.22	...	7.78
27	32	3.46	3.44	3.41	3.36	52	57	7.12	6.98	6.56	6.58	77	82	11.34	8.36	...	8.00
28	33	3.49	3.48	3.44	3.40	53	58	7.24	7.07	6.62	6.64	78	83	11.84	8.50	...	8.25
29	34	3.53	3.52	3.47	3.43	54	59	7.37	7.18	6.68	6.74	79	84	12.37*	8.63*	...	8.51*

*This amount payable for all older ages.

Sixth Option—Monthly Instalments for Each \$1,000 Applied to Provide Income
Guaranteed while both Payees live and two-thirds of amount continued as long as Survivor lives

Age of Beneficiary Males Females		Age of Inured Males 55 Females 60		Married Birthday Males 60 Females 65		Age of Beneficiary Males Females		Age of Inured Males 55 Females 60		Married Birthday Males 60 Females 65		Age of Beneficiary Males Females		Age of Inured Males 55 Females 60		Married Birthday Males 60 Females 65	
Males	Females	Males 55	Females 60	Males 60	Females 65	Males	Females	Males 55	Females 60	Males 60	Females 65	Males	Females	Males 55	Females 60	Males 60	Females 65
25	\$3.63	\$3.74	\$3.85	\$3.97	40	45	\$4.19	\$4.36	\$4.54	\$4.73	60	65	\$5.09	\$5.42	\$5.78	\$6.17	
26	3.65	3.76	3.87	3.99	41	46	4.23	4.41	4.59	4.78	61	66	5.14	5.48	5.86	6.27	
27	3.67	3.78	3.90	4.02	42	47	4.27	4.45	4.64	4.84	62	67	5.19	5.54	5.93	6.36	
28	3.69	3.81	3.92	4.05	43	48	4.31	4.49	4.69	4.89	63	68	5.24	5.61	6.01	6.46	
29	3.72	3.83	3.95	4.08	44	49	4.35	4.54	4.74	4.95	64	69	5.30	5.67	6.09	6.54	
30	3.74	3.86	3.98	4.11	45	50	4.39	4.59	4.80	5.01	65	70	5.35	5.74	6.17	6.65	
31	3.76	3.88	4.01	4.14	46	51	4.43	4.63	4.85	5.08	66	71	5.40	5.80	6.25	6.76	
32	3.79	3.91	4.04	4.17	47	52	4.47	4.68	4.91	5.14	67	72	5.45	5.87	6.33	6.86	
33	3.82	3.94	4.07	4.21	48	53	4.52	4.73	4.97	5.21	68	73	5.51	5.93	6.42	6.94	
34	3.84	3.97	4.10	4.24	49	54	4.56	4.79	5.03	5.28	69	74	5.56	6.00	6.50	7.07	
35	3.87	4.00	4.14	4.28	50	55	4.60	4.84	5.09	5.35	70	75	5.61	6.06	6.58	7.17	
36	3.90	4.03	4.17	4.32	51	56	4.65	4.89	5.15	5.42	71	76	5.67	6.13	6.66	7.28	
37	3.93	4.06	4.21	4.35	52	57	4.70	4.95	5.21	5.50	72	77	5.72	6.19	6.75	7.38	
38	3.96	4.10	4.24	4.40	53	58	4.74	5.00	5.28	5.57	73	78	5.77	6.26	6.83	7.49	
39	3.99	4.13	4.28	4.44	54	59	4.79	5.06	5.35	5.65	74	79	5.83	6.32	6.91	7.60	
35	4.02	4.17	4.32	4.48	55	60	4.84	5.12	5.42	5.73	75	80	5.88	6.39	7.00	7.70	
36	4.05	4.21	4.36	4.53	56	61	4.89	5.17	5.49	5.82	76	81	5.93	6.45	7.08	7.81	
37	4.09	4.24	4.41	4.57	57	62	4.94	5.23	5.56	5.90	77	82	5.98	6.52	7.16	7.92	
38	4.12	4.28	4.45	4.62	58	63	4.99	5.29	5.63	5.99	78	83	6.03	6.58	7.24	8.02	
39	4.16	4.32	4.50	4.67	59	64	5.04	5.35	5.71	6.08	79	84	6.08*	6.64*	7.32*	8.13*	

*This amount payable for all older ages.

*This amount payable for all older ages.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Comes now New England Mutual Life Insurance Company of Boston, a corporation, plaintiff above named, and answers the counterclaim of defendant Harry Lutz and admits, denies and alleges as follows:

I.

Plaintiff admits the allegations of paragraphs I, II, III, V and VIII of said alleged counterclaim.

II.

Answering the allegations of paragraph IV of said alleged counterclaim, plaintiff admits that in consideration of the payment of the premiums provided for in the policy involved in the within entitled action, plaintiff issued its policy of insurance, number 1 172 844, in writing upon the life of Abe Lutz in the face [45] amount of \$13,000, and that said original policy is in the possession of plaintiff and that Exhibit "A", attached to the answer and counterclaim of defendants herein, is a photostatic copy of said original policy, which said policy sets forth the obligations of the plaintiff and the parties hereto. Except as herein expressly admitted, plaintiff denies each, all and every allegation contained in said paragraph IV and the whole thereof.

III.

Answering the allegations of paragraphs VI, VII, and IX of said alleged counterclaim, plaintiff denies each, all and every allegation therein contained and the whole thereof except that plaintiff admits that the sum of \$13,000, nor any part thereof, has not been paid.

And as a Further, Separate and First Affirmative Defense, Plaintiff Alleges:

I.

Plaintiff here refers to the amended complaint for rescission and cancellation of the policy involved in the within entitled action and for declaratory relief, on file in the within entitled action, and by this reference makes the same a part of this affirmative defense with the same force and effect as though the allegations of said amended complaint were set forth herein in full.

Wherefore, plaintiff prays that said Harry Lutz take nothing by his counterclaim; that judgment be rendered in favor of plaintiff and against defendants, as set forth in the prayer of the amended complaint for rescission and cancellation of the policy involved herein and by this reference incorporates the prayer of said amended complaint as a part of the prayer of this answer, with the same force and effect as though the said prayer were set forth herein in full.

MESERVE, MUMPER & HUGHES

By Leo E. Anderson

Attorneys for Plaintiff, New England Mutual Life
Insurance Company of Boston. [46]

[Verified.]

[Endorsed]: Feb. 16, 1945. [47]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on the 23rd day of March, 1945, before the Honorable Ralph E. Jenney, Judge, presiding without a jury, trial by jury having been expressly waived by all parties to said action. Plaintiff appeared by its attorneys, Meserve, Mumper & Hughes by Roy L. Herndon and Leo E. Anderson, and defendants appeared by their attorneys, McLaughlin & McGinley by John P. McGinley and William L. Baugh. Evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision upon the record and upon briefs theretofore filed, the court now finds the facts to be as follows:

FINDINGS OF FACT

I.

That plaintiff, New England Mutual Life Insurance Company of Boston, is, and at all times herein mentioned has been, a corpor- [48] ation duly organized and existing under and by virtue of the laws of the State of Massachusetts with its principal office and place of business in the City of Boston, State of Massachusetts, and a citizen of the State of Massachusetts.

II.

That this action involves an amount, exclusive of interest and costs, in excess of \$3,000.00.

III.

That defendants, Harry Lutz and Rose Lutz, are the duly appointed, qualified and acting executor and exe-

cutrix of the last will and testament of Abe Lutz, deceased, having been duly appointed by the court having jurisdiction of the probate of the estate of said decedent. That each of the defendants herein is a resident and citizen of the State of California and resides within the territorial limits of the Southern District of California.

IV.

That on or about the 14th day of November, 1942, said Abe Lutz, now deceased, as proposed insured, and Harry Lutz, defendant herein, as applicant for insurance, made application to plaintiff company for the issuance of a policy of ordinary life insurance in the amount of \$13,000.00 upon the life of said Abe Lutz; that said application was in writing and was signed by said Abe Lutz and by defendant Harry Lutz.

V.

That on or about the 16th day of November, 1942, in connection with, and as a part of, said application for insurance, and for the purpose of inducing plaintiff company to issue a policy of insurance on his life, said Abe Lutz presented himself to the medical examiner of plaintiff company for medical examination, and was then examined by said medical examiner and, in connection with such examination, made certain answers to questions contained in said application, which questions were propounded by said examiner; that the [49] answers given by said Abe Lutz to said questions were accurately recorded in writing as a part of said application for said policy of insurance; that said Abe Lutz thereafter read and signed said application and certified that his answers to the questions therein contained were true, complete and correctly recorded therein. That said application for

insurance was delivered to plaintiff company by defendant Harry Lutz.

VI.

That thereafter, and on or about December 1, 1942, plaintiff company issued its policy of life insurance number 1 172 844 in the face amount of \$13,000.00 upon the life of said Abe Lutz. That said policy of insurance was delivered to defendant Harry Lutz at Los Angeles, California, on or about December 9, 1942, and defendant Harry Lutz did then and there pay the first premium upon said policy. That at the time of the issuance and delivery of said policy as aforesaid, a true and correct photostatic copy of said application therefor, including the answers made by the insured to the medical examiner as aforesaid, was attached to, and made a part of, said policy.

VII.

That by the terms of said policy of life insurance issued by plaintiff company as aforesaid, it was provided, among other things, that upon receipt of due proof of the death of said Abe Lutz, the insured, plaintiff company would pay to Harry Lutz, son of the insured, or, if deceased, the executors, administrators or assigns of said son, the sole owner of said policy, the sum of \$13,000.00.

VIII.

That said Abe Lutz, the insured named in said policy of life insurance, died in the City of Los Angeles, County of Los Angeles, State of California, on or about the 28th day of May, 1944; that defendant Harry Lutz, the beneficiary named in said policy, [50] then was, and now is, alive.

IX.

That in and by said application for said policy of insurance, said Abe Lutz, insured, represented to plaintiff company that said Abe Lutz had never suffered from indigestion, dizziness, or fainting spells, palpitation of the heart or pain or pressure in the chest. That said representations were false and were known by said insured to be false at the time said application was made and signed; that prior to the time that said application for insurance was made and signed, said insured had suffered from indigestion, dizziness and fainting spells and from pain in the chest.

X.

That in and by said application for insurance, the insured was asked whether he had consulted or been examined by a physician or other practitioner within five years prior to the date thereof, and, if so, to give reasons, name of practitioner and details with reference thereto. That in response to said questions, the insured disclosed no information except that he had consulted Dr. Maurice H. Rosenfeld in August, 1942, and was given at that time a physical examination and blood sugar determination; and insured represented that the report of said examination was normal.

XI.

That, within five years prior to the date of said application, said insured had consulted, and had been examined by, physicians at times other than in August, 1942; that within five years prior to the date of said application for insurance, said insured had consulted and been treated by physicians for dizziness and fainting spells and for pain in the chest. That during the year

1942 and prior to the date of the application for said insurance, said insured, on numerous occasions had consulted and been examined by a physician and had received treatments for angina pectoris, a disease of the heart. That during the year 1942 and prior to the [51] date of the application for said policy of insurance, said insured had submitted to repeated physical examinations which included the taking of electrocardiograms and had been told by his physician that he was suffering from a heart ailment, to-wit, angina pectoris, and that he should curtail and limit his activities by reason thereof; that during the year 1942 and prior to the date of the application for said policy of insurance, said insured's physician had prescribed medicine to relieve pain in the chest suffered by insured as a result of said heart ailment. That all of the facts in this paragraph recited were concealed, and none of them was disclosed, in the application for said policy of insurance.

XII.

That all of the facts concerning the health and medical history of said insured which were misrepresented and concealed in the application for said policy of insurance, as herein found, were known to the insured at the time said application was made and signed, and said facts were material to the risk insured against under the terms of said policy.

XIII.

That plaintiff company, in issuing said policy number 1 172 844 upon the life of said Abe Lutz, relied upon the facts as disclosed and represented in the application for said policy; that plaintiff company would not have issued said policy of life insurance if, at the time said policy was issued, plaintiff had known the facts concerning the

health and medical history of the insured which were concealed and misrepresented in and by said application, as hereinabove set forth.

XIV.

That said policy of insurance, subsequent to its delivery to defendant Harry Lutz as aforesaid, was placed in a safe deposit box to which both the insured and defendant Harry Lutz had access; that both said insured and said Harry Lutz had knowledge of the [52] terms and provisions of said policy from and after the date of its delivery.

XV.

That subsequent to the death of said Abe Lutz, plaintiff company, for the first time, received information causing it to believe that the statements and answers contained in said application for insurance were not true, and, by reason thereof, plaintiff thereafter caused an investigation to be made, and, as a result of said investigation, plaintiff first learned the true facts concerning the matters misrepresented and concealed in said application for insurance, as hereinabove set forth. That prior to the death of said insured, plaintiff company had no knowledge, information or notice that any material fact concerning the health or medical history of said insured was misrepresented or concealed in said application.

XVI.

That promptly after discovering that material facts concerning the health and medical history of said insured had been misrepresented and concealed in said application, plaintiff company gave notice in writing to defendant Harry Lutz that it had elected to, and did thereby, rescind said policy of life insurance. The at the time of giving

its said notice of rescission, plaintiff company duly tendered to defendant Harry Lutz the sum of \$2,523.43. That said amount so tendered to defendant Harry Lutz constituted and represented all of the premiums and considerations received by plaintiff company for, or on account of, the issuance of said policy of insurance, together with interest thereon from the date of receipt thereof by plaintiff to the date of said tender. That defendant Harry Lutz rejected and declined to accept said tender. That at the time of making said tender, plaintiff company was, and ever since has been, ready, willing and able to restore to defendant Harry Lutz all premiums paid and considerations given by said defendant and [53] received by plaintiff company in consideration of the issuance of said policy of insurance.

XVII.

That in and by said policy of insurance, it was provided that said policy should be incontestable after two years from the date of issuance thereof, except for non-payment of premiums. That at the time of the commencement of this action, a period of two years had not elapsed since the date of the issuance of said policy, but that said two-year period was then about to elapse. That after the expiration of said two years from the date of issuance of said policy of insurance, plaintiff company would have been prevented, by reason of said incontestable clause, from contesting said policy or from relieving itself from liability thereunder by reason of misrepresentation and concealment in the procurement thereof. That no action to recover upon said policy had been instituted by defendants, or either or any of them. That it was therefore necessary for plaintiff to commence this action to rescind and cancel said policy in order

to save its rights to contest the validity of said policy, which rights otherwise would have been lost upon the expiration of said period of two years.

XVIII.

That plaintiff company has no adequate remedy at law, and that if said policy were left outstanding, it would, or might be, the source of irreparable injury to plaintiff.

XIX.

That it was, and is, provided by the terms of said policy of life insurance and of the application therefor that said policy should not take effect unless and until said application should be approved by plaintiff at its home office and the first premium paid while the said insured was in good health. That said insured was not in good health at the time said policy was delivered, or at the time the first premium thereon was paid. That said insured knew, [54] at the time said application for insurance was signed and delivered and at the time said policy was issued and delivered, and at the time the first premium thereon was paid, that he was not in good health, but that he was suffering from a serious disease of the heart, to-wit, angina pectoris.

XX.

That all of the premiums paid on said policy of insurance were paid by defendant Harry Lutz, individually. That defendants Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, have disclaimed any and all right, title or interest in or to said policy, any proceeds thereof and any moneys required to be restored by plaintiff upon rescission thereof; that the estate of said decedent,

Abe Lutz, has no right, title or interest in or to said policy or any proceeds thereof, or any moneys required to be paid or restored by plaintiff upon the cancellation and rescission of said policy.

XXI.

That at the time said application for said policy was signed by said insured, said insured knew the contents thereof and knew that the answers to the questions therein contained concerning his health and medical history were not true and complete, and knew that matters of fact, concerning his health and medical history and material to the risk to be insured against by the policy therein applied for, were concealed and misrepresented in and by said application. That it is not true that said insured truly and correctly answered all questions asked him by the medical examiner and by the agent who filled in the application for said policy.

XXII.

That it is not true that said insured furnished the agents and representatives of plaintiff with full, true and correct information on all matters as to which information was requested by said agents and representatives, but that said insured did misrepresent [55] and conceal matters of fact concerning which he was interrogated.

XXIII.

That it is true that prior to the time said policy was issued by plaintiff, the insured was examined by plaintiff's medical examiner, and that said medical examiner made a report to plaintiff concerning said examination. It is true that plaintiff's representatives contacted the office of the physician of said insured, but it is not true that they obtained, or that plaintiff had the opportunity of

obtaining, full, true or correct information from such physician regarding the physical condition and health of said insured. That it is not true that plaintiff knew that other insurance policies were cancelled by defendant Harry Lutz, or that the insurance policy herein described was obtained in lieu and in place of other insurance policies on the life of said Abe Lutz. That it is not true that plaintiff had ample opportunity to ascertain the true facts concerning the health and medical history of said insured prior to the death of said insured. That it is not true that plaintiff is estopped to rescind or cancel said policy or to refuse payment of the proceeds thereof; that it is not true that plaintiff is precluded from relief by reason of any delay in rescinding said policy; that it is true that plaintiff rescinded said policy promptly upon discovery of facts entitling it to rescind.

XXIV.

That it is true that a representative of plaintiff contacted the office of a physician of Abe Lutz, but it is not true that plaintiff obtained, or had the opportunity of obtaining, any information from such physician regarding the physical condition or health of said Abe Lutz; that it is not true that at the time of the making and signing of the application for said policy, the said Abe Lutz informed plaintiff's medical examiner and agent that Dr. Maurice H. Rosenfeld of Los Angeles, California, was his family and attending [56] physician and had given him a complete physical examination, including, but not limited to, blood sugar tests; that it is true that insured disclosed to the medical examiner that he had submitted to a physical examination and blood sugar determination by Dr. Maurice H. Rosenfeld in August, 1942, and stated that the report of said examination was normal. That it

is not true that plaintiff's medical examiner, in examining said insured, made tests of all matters concerning which plaintiff was misled by the misrepresentations and concealments in the application for said policy. That it is true that prior to insured's death plaintiff made no investigation to determine the truthfulness or completeness of the answers and information contained in the application for said policy; that it is true that plaintiff relied upon the truthfulness and completeness of the answers made and contained in said application. That it is not true that plaintiff has waived all or any of the matters, facts and things concerning which it was misled and concerning which information was concealed and misrepresented in the application for said policy.

XXV.

That all premiums and considerations paid to plaintiff in consideration of the issuance of said policy were paid by defendant Harry Lutz; that the total amount of the premiums and considerations so paid by defendant Harry Lutz, with interest thereon at the legal rate from the date of payment thereof to October 10, 1944, the date on which plaintiff tendered to defendant Harry Lutz the return thereof, is the sum of \$2,523.43; that on October 10, 1944, plaintiff made a good, sufficient and legal tender of said sum to defendant Harry Lutz.

XXVI.

That except as the facts are otherwise expressly found herein, all of the allegations of plaintiff's amended complaint herein are true, and all of the allegations of defendants' answer and of the [57] counterclaim of defendant Harry Lutz are untrue, except as the same have been found herein to be true.

And, from the foregoing facts, the court draws its conclusions of law as follows:

CONCLUSIONS OF LAW

I.

That plaintiff, New England Mutual Life Insurance Company of Boston, a corporation, is entitled to judgment cancelling and rescinding said policy of insurance, declaring said policy void and requiring that the original of said policy be delivered into the possession of plaintiff company for cancellation.

II.

That plaintiff is entitled to judgment declaring that defendants herein have no rights and that plaintiff has no duties, liabilities or obligations under or by virtue of said policy of life insurance, except that defendant Harry Lutz is entitled to receive, and that plaintiff is obligated to pay to said defendant Harry Lutz, the sum of \$2,523.43, said sum to constitute a full restoration by plaintiff company of all premiums and considerations received by it under or by virtue of said policy of insurance.

III.

That said policy of insurance failed to become effective by reason of the fact that the insured therein named was not in good health, and knew that he was not in good health, when the application for said policy was approved by plaintiff, when the first premium on said policy was paid, and when said policy was delivered.

IV.

That by reason of misrepresentation and concealment of facts, known to the insured and material to the risk, which facts said insured ought to have communicated and disclosed in said application, plaintiff did promptly rescind, and was entitled to rescind, said policy of insurance. [58]

V.

That plaintiff has not waived, and is not estopped to assert, its right to rescind said policy of insurance.

VI.

That none of the matters or causes of action set forth in plaintiff's amended complaint herein is barred by the provision of said policy by which said policy is declared to be incontestable after it has been in force for a period of two years from the date of its issue.

VII.

That plaintiff is entitled to judgment herein declaring that defendant Harry Lutz shall take nothing by this action or by his counter-claim filed herein.

Now, Therefore, Let Judgment Be Entered Accordingly.

Dated: This 13th day of June, 1945.

RALPH E. JENNEY

Judge.

[Endorsed]: Filed Jun. 14, 1945. [59]

In the District Court of the United States
Southern District of California
Central Division

Civil No. 3930—R. J.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation,

Plaintiff,

vs.

HARRY LUTZ and HARRY LUTZ and ROSE
LUTZ, as executor and executrix of the last will and
testament of Abe Lutz, Deceased,

Defendants.

JUDGMENT

The above entitled action came on regularly for trial on the 23rd day of March, 1945, before the Honorable Ralph E. Jenney, Judge, presiding without a jury, trial by jury having been expressly waived by all parties to said action. Plaintiff appeared by its attorneys, Meserve, Mumper & Hughes, by Roy L. Herndon and Leo E. Anderson, and defendants appeared by their attorneys, McLaughlin & McGinley, by John P. McGinley and William L. Baugh. Evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision upon the record and upon briefs theretofore filed, and the court having found the facts specially and stated separately its conclusions of law thereon and having directed the entry of judgment accordingly in favor of plaintiff, [60]

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That policy of life insurance numbered 1 172 844, issued by New England Mutual Life Insurance Company of Boston, a corporation, on the life of Abe Lutz, in the

face amount of \$13,000.00 and naming defendant, Harry Lutz son of the insured, as beneficiary thereunder, be, and it is hereby, rescinded and cancelled.

(2) That the original of said policy of life insurance shall be surrendered and delivered to plaintiff, New England Mutual Life Insurance Company of Boston, for cancellation.

(3) That defendants herein have no rights, and plaintiff company has no duties, liabilities or obligations, under or by virtue of said policy of life insurance, except that defendant Harry Lutz is entitled to receive, and that plaintiff is obligated to pay to said Harry Lutz, the sum of \$2,523.43, said sum to constitute a full and complete restoration by plaintiff company of all premiums and considerations received by it under or by virtue of said policy.

(4) That except as hereinabove expressly provided, defendant Harry Lutz shall take nothing by this action or by his counter-claim herein.

(5) That plaintiff have and recover from defendant Harry Lutz its costs, which shall include the amounts paid by plaintiff to the official stenographic reporters for their services in reporting, and for the original copies of those transcripts of the testimony and proceedings upon the trial which were furnished to the court; plaintiff's said costs are hereby taxed and allowed in the sum of \$248.05.

Dated: This 13th day of June, 1945.

RALPH E. JENNEY

Judge

Judgment entered Jun. 14, 1945. Docketed Jun. 14, 1945. Book 33, page 359. Edmund L. Smith, Clerk; by P. D. Hooser, Deputy.

[Endorsed]: Filed Jun. 14, 1945. [61]

[Title of District Court and Cause.]

STIPULATION FOR PAYMENT AND ACCEPT-
ANCE OF MONEYS WITHOUT PREJUDICE
TO RIGHTS OF EITHER PARTY ON APPEAL

Whereas on or about the 14th day of June, 1945, the Judgment was signed and entered in the above entitled action, which provided, among other things, that the defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, were entitled to receive, and that plaintiff was obligated to pay said defendants the sum of Two Thousand Five Hundred Twenty-three Dollars and Forty-three Cents (\$2,523.43), as a full and complete restoration by plaintiff of all premiums and considerations received by it under and by virtue of the life insurance policy involved in the said action; and

Whereas defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, intend to appeal from the said judgment, and plaintiff [62] is desirous of refunding such moneys less costs due plaintiff before the outcome or final determination of said action on appeal;

Now Therefore, It Is Hereby Stipulated by and between plaintiff and defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, as follows:

1. That plaintiff may pay to Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the

Last Will and Testament of Abe Lutz, Deceased, and said defendants may receive the said sum of \$2,275.38, which represents the \$2,523.43 after deducting the plaintiff's costs taxed by the trial court in the above entitled matter in the sum of \$248.05, and that said sum may be paid and accepted without prejudice to the right of defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, to appeal from the judgment in the above entitled action, and to urge on said appeal as grounds for reversal and as error each and every ground and error which defendants might have urged if the said payment had not been made.

2. In the event that the judgment is affirmed, or the appeal otherwise disposed of adversely to said defendants, defendants agree to execute and deliver to plaintiff a full satisfaction of the judgment.

3. In the event that it should be finally determined in this action that defendants are entitled to the relief or recovery, or any part of the relief or recovery which defendants sought hereunder, then and in such event the moneys paid hereunder shall be credited toward any larger sum which might be adjudged or decreed to be due and owing from plaintiff to defendants, and such judgment shall be partially satisfied by the amount of the payment made herein as hereinabove specified.

4. This stipulation shall in no way prejudice the con- [63] tentions which either party might otherwise

be entitled to urge in connection with said appeal, nor shall it be deemed as an admission against either party in connection with any matter urged on such appeal.

Dated: July 16, 1945.

MESERVE, MUMPER & HUGHES

By Roy L. Herndon

Attorneys for Plaintiff

McLAUGHLIN & McGINLEY

By John P. McGinley

Attorneys for Defendants

[Endorsed]: Filed Jul. 23, 1945. [64]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT
OF APPEALS UNDER RULE 73(B).

Notice Is Hereby Given that Harry Lutz and Harry Lutz and Rose Lutz, as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 14, 1945, in Civil Order Book No. 33, page 359, and particularly from paragraphs (1), (2), (3) and (4) thereof, reading as follows:

“(1) That policy of life insurance numbered 1 172 844, issued by New England Mutual Life Insurance Company of Boston, a corporation, on the life of Abe Lutz, in the face amount of \$13,000.00 and naming defendant, Harry Lutz, son of the insured, as beneficiary thereunder, be, and it is hereby, rescinded and cancelled. [65]

“(2) That the original of said policy of life insurance shall be surrendered and delivered to plaintiff, New England Mutual Life Insurance Company of Boston, for cancellation.

“(3) That defendants herein have no rights, and plaintiff company has no duties, liabilities or obligations, under or by virtue of said policy of life insurance, except that defendant Harry Lutz is entitled to receive, and that plaintiff is obligated to pay to said Harry Lutz, the sum of \$2,523.43, said sum to constitute a full and complete restoration by plaintiff company of all premiums and considerations received by it under or by virtue of said policy.

“(4) That except as hereinabove expressly provided, defendant Harry Lutz shall take nothing by this action or by his counter-claim herein.”

Dated: August 10, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Appellants Harry Lutz and
Harry Lutz and Rose Lutz as Executor
and Executrix of the Last Will and
Testament of Abe Lutz, Deceased

Address: 1224 Bank of America Bldg.
650 South Spring Street
Los Angeles 14, California

[Endorsed]: Filed & mailed copy to Meserve, Mumper & Hughes, Roy L. Herndon, Leo Anderson, attys. for plf. Aug. 28, 1945. [66]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto New England Mutual Life Insurance Company of Boston, a corporation, plaintiff in the above entitled case, in the penal sum of Two Hundred Fifty Dollars (\$250) to be paid to said plaintiff, its successors, assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such, That Whereas defendant and appellants, Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament [67] of Abe Lutz, deceased, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court of the United States, Southern District of California, Central Division, made and entered on June 14, 1945, in Civil Order Book No. 33, page 359, in favor of New England Mutual Life Insurance Company of Boston, a corporation, in the above entitled case.

Now, Therefore, if the above named appellants shall answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety,

the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 13th day of August, 1945.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By D. M. Ladd

Attorney-in-fact

Attest Robert Hecht

Agent [68]

State of California

County of Los Angeles—ss.

On this 13th day of August, 1945, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared D. M. Ladd, known to me to be the attorney in fact, and Robert Hecht, known to me to be the agent of Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto, and their own names as attorney in fact and agent respectively.

(Seal)

S. M. SMITH

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Feb. 18, 1946.

Examined and recommended for approval as provided
in Rule 8.

JOHN P. MCGINLEY

Attorney.

The premium charged for this bond is \$10.00 *Dollars*
per annum.

[Endorsed]: Filed Aug. 28, 1945. [69]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON APPEAL
UNDER RULE 19(6)

Notice Is Hereby Given that at the hearing of this appeal, appellants will rely upon the following points:

Point I.

The trial court erred in denying defendants' motion for dismissal at close of plaintiff's case. This error resulted primarily from (a) failure properly to apply the law of contracts which prevents a party from claiming and enjoying the benefits of a contract at the same time while urging the contract to have been void from its inception. The plaintiff had denied liability under the policy of insurance in suit, yet was permitted to claim the benefits of a waiver of confidential communications signed by insured on the application which was made a part of the policy by incorporation; and (b) failure to decree that plaintiff had [74] waived and was estopped to claim that material information had been withheld from it relative to insured's physical condition and medical history.

Point II.

The trial court erred in admitting, over objection of the defendants, testimony of insured's attending physician disclosing information relating to the health and physical condition of the insured during his lifetime. Such information was acquired from insured to enable said attending physician to prescribe treatment. This error was contributed to by the court's failure to rule that (a) a phy-

sician may not, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient; (b) plaintiff insurance company was prohibited and estopped from claiming and enjoying the benefits of the waiver which, by the terms of the policy, was expressly made a part of the contract, when it affirmatively appeared by the pleadings and proof that plaintiff insurance company denied all liability under said policy and claimed that said contract was void from its inception; and (c) certain limited and special waivers signed by the beneficiary under the policy, after the insured's death, did not constitute general waivers of privileged communications relating to the insured's health and medical history.

Point III.

The trial court erred in decreeing rescission and cancellation of the policy in suit for fraud of insured in allegedly concealing and misrepresenting material facts relative to the insured's health and medical history. This error resulted from a failure properly to apply the law of waiver and estoppel against plaintiff insurance company under the special facts shown by the evidence.

Point IV.

The trial court erred in failing to decree that plaintiff [75] had waived the alleged fraud complained of. This error resulted from an improper interpretation and application of the law relating to the defense of

waiver in view of the evidence showing that (a) plaintiff insurance company had placed at its disposal, prior to the issuance of the policy in suit, the exact source from which it could have obtained the information upon which the court decreed rescission and cancellation; (b) plaintiff insurance company was furnished with a waiver of confidential communications, the name of insured's attending physician, the fact of a physical examination shortly prior to the date of the application, yet made no investigation or an incomplete investigation, promptly issued its policy and accepted without protest two annual premiums; and (c) plaintiff insurance company remained silent during the lifetime of insured, and following the death of insured and filing of notice of claim and proof of death, for the first time, by investigation disclosed facts concerning insured's health and medical history, which could have been ascertained by it prior to the issuance of the policy, or, in any event, during the lifetime of insured, by contacting insured's attending physician.

Point V.

The trial court erred in failing to find that plaintiff was estopped from asserting the alleged fraud complained of. The error resulted from an improper interpretation and application of the law relating to the defense of estoppel under the circumstances set forth under Point IV. Additionally, (a) the defendant Harry Lutz had caused to be cancelled, to his prejudice, other insurance policies on the life of the insured, in the belief that the policy in suit was valid; and (b) no attempt was made by plaintiff

insurance company to cancel or rescind the policy in suit until after the death of the insured and subsequent to the time defendant Harry Lutz had materially changed his position [76] by accepting lesser benefits from paid-up policies on the life of insured.

Dated: September 7, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Appellants Harry Lutz and
Harry Lutz and Rose Lutz as Executor
and Executrix of the Last Will and
Testament of Abe Lutz, Deceased.

Address: 1224 Bank of America Building
650 South Spring Street
Los Angeles 14, California

Received copy of the within document this 7th day of
Sept. 1945. Meserve, Munper & Hughes, by Berta Diet-
rich, Attorneys.

[Endorsed]: Filed Sep. 7, 1945. [77]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties to the above entitled cause, through their respective attorneys, that the time for filing the record on appeal herein and docketing this appeal may and shall be extended to and including November 6, 1945.

This stipulation is a part of the record on appeal.

Dated: October 22, 1945.

McLAUGHLIN & McGINLEY

JOHN P. McGINLEY

W. L. BAUGH

Attorneys for Defendants-Appellants [86]

MESERVE, MUMPER & HUGHES

By Roy L. Herndon

Attorneys for Plaintiff-Appellee

It Is So Ordered.

H. A. HOLLZER

United States District Judge

Dated: October 23, 1945.

[Endorsed]: Filed Oct. 23, 1945. [87]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties to the above entitled cause, through their respective counsel, that the time for filing the record on appeal herein and docketing this appeal may and shall be extended to and including November 16, 1945.

This stipulation is a part of the record on appeal.

Dated: October 31, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Defendants-Appellants [90]

NESERVE, MUMPER & HUGHES
By Roy L. Herndon
Attorneys for Plaintiff-Appellee

It Is So Ordered

PAUL J. McCORMICK
United States District Judge

Dated: Nov. 2, 1945.

[Endorsed]: Filed Nov. 2, 1945. [91]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF RECORDS, PROCEEDINGS AND EVIDENCE

It Is Hereby Stipulated by and between the parties to the above entitled cause, through their respective attorneys, that the Clerk of this Court, in conformance with Rule 75 of the Rules of Civil Procedure, shall transmit to the Clerk of the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, the portions of the record, proceedings and evidence in this case designated by appellants on October 30, 1945, certifying those portions which are necessary to be certified in pursuance of said rule, or pursuant to the rules of said Circuit Court of Appeals; the original reporter's transcript and the original exhibits forwarded pursuant to Rule 75(i) to be held by the Clerk of the Circuit Court of Appeals pending said appeal and thereafter returned to [88] this Court.

This stipulation is a part of the record on appeal.

Dated: October 30, 1945.

McLAUGHLIN & McGINLEY

JOHN P. McGINLEY

W. L. BAUGH

Attorneys for Defendants-Appellants

MESERVE, MUMPER & HUGHES

By Roy L. Herndon

Attorneys for Plaintiff-Appellee

It Is So Ordered.

PAUL J. McCORMICK

United States District Judge

Dated: Oct. 31, 1945.

[Endorsed]: Filed Oct. 31, 1945. [89]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages numbered from 1 to 91 inclusive contain full, true and correct copies of Amended Complaint for Rescission and Cancellation of Life Insurance Policy and for Declaratory Relief; Answer of Harry Lutz and Harry Lutz and Rose Lutz, as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, to Amended Complaint of Plaintiff, and Counterclaim of Harry Lutz; Answer to Counterclaim; Findings of Fact and Conclusions of Law; Judgment; Stipulation for Payment and Acceptance of Moneys Without Prejudice to Rights of Either Party on Appeal; Notice of Appeal; Undertaking for Costs on Appeal; Designation of Portions of Record on Appeal; Statement of Points on Appeal; Designation by Appellee of Additional Portions of Record; Objections of Defendants to Designation by Appellee of Additional Portions of Record; Appellee's Reply to Objections of Appellants to Appellee's Designation of Additional Portions of Record; Stipulations and Orders Extending Time to Docket Appeal and Stipulation and Order for Transmission of Records, etc.; which, together with Original Plaintiff's Exhibits Nos. 1, 2, 4, 5, 6, 7, 9, 10, 11, 20, 27 and 29 and Original Defendants' Exhibits Nos. C, D, and P and five volumes of Original Reporter's Transcripts, trans-

mitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.45 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 10 day of November, 1945.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause.]

Hon. Ralph E. Jenney, Judge Presiding

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Appearances:

Messrs. Meserve, Mumper & Hughes, by Roy L. Herndon, Esq., and Leo Anderson, Esq., for Plaintiff.

Messrs. McLaughlin & McGinley, by John P. McGinley, Esq., and W. L. Baugh, Esq., for Defendants.

Los Angeles, California, Friday, March 23, 1945;
10 a. m.

Mr. Herndon: May it please your Honor, plaintiff will offer as its first exhibit the pre-trial stipulation. I assume that it will not be necessary to read that stipulation into evidence.

The Court: No, I have already read it. That is the statement: Re pre-trial conference?

Mr. Herndon: Yes, your Honor, it embraces the stipulation as to certain facts.

The Court: That is the one filed March 12, 1945?

Mr. Herndon: Yes, your Honor.

The Court: That may be received in evidence and marked Plaintiff's Exhibit No. 1.

Mr. Herndon: I have heretofore shown to counsel, and now offer in evidence as plaintiff's exhibit next in order, the original application for policy in suit which consists of two parts headed: Part 1, application to New England Mutual Life Insurance Company; Part 2, application to New England Life Insurance Company and attached to application as part of the same document are the agent's certificate and report of the medical examiner.

The Court: You wish those to be one exhibit?

Mr. Herndon: Yes, your Honor.

The Court: Will the clerk please fasten these together?

Mr. Herndon: I have the original here, your Honor, of [2*] which this is a certified copy.

The Court: Very well. Have you got them all together? Is that one document?

Mr. Herndon: Yes; they are all an integral part.

The Court: That will be Plaintiff's Exhibit No. 2.

Mr. Herndon: As plaintiff's next exhibit in order we offer the original policy bearing No. 1172844.

The Court: That is what document?

Mr. Herndon: The original policy of insurance.

The Court: That may be received and marked Plaintiff's Exhibit No. 3.

Mr. Herndon: As plaintiff's exhibit next in order we offer notice of claim and proof of death on the form of New England Mutual Life Insurance Company of Boston, Massachusetts.

The Court: It may be received and marked next in order.

The Clerk: No. 4.

Mr. Herndon: At this time, if the court please, I would like to call as plaintiff's first witness Mr. H. C. Ludden. [3]

*Page numbering appearing at top of page of original Reporter's Transcript.

H. C. LUDDEN,

a witness called by and on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: How do you spell your last name?

The Witness: L-u-d-d-e-n.

Direct Examination

Q. By Mr. Herndon: Where do you reside, Mr. Ludden? A. 6712 Leland Way, Hollywood.

Q. What is your business or occupation?

A. Pharmacist.

Q. How long have you been engaged in that profession? A. About 30 years.

Q. Are you licensed in the State of California?

A. I am.

Q. Where do you follow this profession?

A. 301 South Western Avenue.

Q. What is the name of the business located at that address? A. It is in the Harth Building.

Q. What is the name of the concern with which you are connected? A. The Marvel Drug Company.

Q. Are you the owner or an employee of the Marvel Drug Company? A. An employee.

Q. How long have you been employed there? [4]

A. 13 years.

Q. Did you know Abe Lutz in his lifetime?

A. I did.

Q. Do you recall where he resided in 1942?

A. 220 South St. Andrews Place.

Q. How long had you known Mr. Lutz?

A. I would say around 20 years.

Q. Did he have occasion to come to the Marvel Drug Company? A. He did.

(Testimony of H. C. Ludden)

Q. During the year 1942? A. Yes, sir.

Q. Did you ever have occasion to fill a prescription for him? A. I did.

Q. You were served with a subpoena, were you not, to bring along certain records? A. Yes.

Q. Have you brought such records with you?

A. Yes, sir.

Q. Will you produce them please? Mr. Ludden, you have handed me three slips of paper, the first of which is headed Stephen G. Seech, M.D., dated January 15, 1937, and the second headed Stephen G. Seech, M.D., bearing date 10/11/37, and a third under the heading of Henry H. Lissner, M.D., and Maurice H. Rosenfeld, M.D., bearing date [5] 6/1/42. Are those papers which you have handed me taken from the records of the Marvel Drug Company? A. They are, sir.

Mr. Herndon: May I show them to counsel, your Honor?

The Court: Yes.

Q. By Mr. Herndon: Mr. Ludden, what was the practice of the Marvel Drug Company with respect to keeping and filing of prescriptions and documents of the character which you have just handed me?

A. They are numbered and filed, kept on file. We have to keep them for at least four years.

Q. And when are they filed with reference to the time when they are filled by you? A. Immediately.

Q. Is that practice uniformly followed by the Marvel Drug Company? A. Yes, sir.

The Court: It is a matter of State law, is it not, State regulation? A. Yes, sir.

Mr. Herndon: If your Honor please, I don't know whether these should be identified at this time, or whether

(Testimony of H. C. Ludden)

I should interrogate the witness without having offered them. I think, if the court please, I will offer them for identification at this time.

The Court: Very well. [6]

Mr. Herndon: The first will be the prescription under the heading of Stephen G. Seech, M.D., dated 1/15/43.

The Court: It may be received temporarily for identification, and if they are received in evidence they will bear the same number.

The Clerk: No. 5.

Mr. Herndon: The second under the heading: Stephen G. Seech, M.D., bearing date 10/11/37.

The Clerk: No. 6.

Mr. Herndon: The third prescription under the heading: Henry H. Lissner, M.D., Maurice H. Rosenfeld, M.D., bearing date 6/1/42.

The Court: They may be received and so marked.

The Clerk: No. 7.

Q. By Mr. Herndon: Mr. Ludden, I show you now Plaintiff's Exhibit No. 5 for identification, and ask you if you can tell who filled that prescription?

A. Mr. Vosmeyer.

Q. I show you now Plaintiff's Exhibit No. 6 for identification, and ask you if you can state by whom that prescription was filled?

A. That one was filled by Mr. Vosmeyer.

Q. I show you now Plaintiff's Exhibit No. 7 for identification, and ask you if you will state, if you know, by whom that prescription was filled?

A. I filled that one. [7]

Q. Do you know whether or not any of the material which appears on Plaintiff's Exhibit No. 7 for identifica-

(Testimony of H. C. Ludden)

tion was placed on the bottle or package in which that medicine was given to the patient?

A. No, there would be none outside of our prescription number; that would be the only thing to identify it.

Q. Would the name of the medicine appear on the package or bottle? A. No, sir, it should not.

Q. Do you recall the occasion of filling this prescription? A. I do.

Q. Who brought the prescription to you to be filled?

A. Mr. Lutz himself.

Q. Was that done on or about the date the prescription bears, that is, June 1, 1942?

A. It was done on the date that that is typewritten. There is a date printed there in typewriting. It was filled on the 1st of June, 1942.

Q. On that occasion, Mr. Ludden, did Mr. Lutz express to you anything to the effect that he was suffering from any pain or illness?

Mr. McGINLEY: If your Honor please, I object to the question on the ground that it calls for the opinion and conclusion of the witness, and also upon the ground that as against the plaintiff's beneficiary and counterclaimant [8] beneficiary, the evidence is incompetent, irrelevant and immaterial and hearsay.

The Court: It seems to me that the second objection is sound. You are calling for oral statement of a decedent which would be hearsay, as to the counterclaimant, would it not?

Mr. Herndon: I would submit, your Honor, that it comes within several exceptions to the hearsay rule. First and primarily, a well-recognized exception to the hearsay rule relates to the expressions of present pain

(Testimony of H. C. Ludden)

and suffering; second, it is our contention that as to the insured and defendant beneficiary, Harry Lutz, or his privity, that declarations of the insured are binding against the beneficiary who is a party to the contract *ab initio*. It is subject to another exception to the hearsay rule, I think, in that it goes to the knowledge and state of mind of the insured. One of the primary issues in this case, and a very important issue in this case, is what Abe Lutz, the insured, knew on the date when he signed the application of the policy in suit. I submit to your Honor that under a well-recognized rule of law that declarations by a person whose knowledge is in question, declarations to a party whose knowledge is in question, are admissible as circumstantial evidence, of knowledge, and the introduction of such evidence does not in any way violate the hearsay rule. I don't know whether your Honor has access in your Honor's library to Corpus [9] Juris Secundum, but there is a very excellent article on evidence, and with your Honor's permission I will read some excerpts from it. It follows the rules laid down by Wigmore.

The Court: I am very familiar with that. Taking up your first point, which you made, and to clarify our thinking, in an accident case, where a man spontaneously, as a part of the accident, for instance, says: "Oh, my God. I can't see; I am blind," even though that would possibly be hearsay it is permitted for very definite reasons of evidence, and very sound ones; but here a man comes into a pharmacist to have a prescription filled, and in connection with the filling of that prescription he makes a statement, to illustrate, that he is having a lot of pain or pressure in his chest, and he asks the pharmacist if the

(Testimony of H. C. Ludden)

pharmacist thinks that will do him any good. It seems to me there is quite a distinction between that situation and one which we customarily have in connection with some accident, for instance, but I would like to hear what you have in the way of authorities on that. There are getting to be so many exceptions to the hearsay rule nowadays that exceptions to the hearsay rule become to some extent a thing of the past. The proposed rules on the introduction of evidence are almost going to take the bottom right out of the hearsay rule.

Mr. Herndon: As I say, your Honor, I think these [10] statements in *Corpus Juris Secundum* are very clear, and they follow Wigmore, and the authorities are numerous. With your Honor's permission, I will read a few excerpts that bear on the matter. I am going to read from Volume 31 *Corpus Juris Secundum*. First, I should like to read Section 257, under the title Evidence, at page 1009:

"The existence of knowledge may be shown, or the absence of knowledge may be shown by declarations of the person whose knowledge is of importance, even though such declarations were made a considerable time before or after the time involved in the inquiry, provided there is not such an element of remoteness as destroys materiality."

The Court: That is perfectly clear, where the man is alive and available to deny it. Here the man is deceased, and you come against other rules. Go right ahead.

Mr. Herndon: "Where a person's knowledge of a particular fact is relevant, it may be shown that an unsworn statement of another person as to its existence was brought to his attention in the same way that any

(Testimony of H. C. Ludden)

other relevant statement may be shown to have been made to him. It is accordingly permissible to show direct and specific statements, such as advice, information, instructions, notices, representations, or threats. The evidence offered must in all cases have a logical tendency to establish the fact of knowledge, but, provided the time is not too remote, statements made to a person whose knowledge is relevant may be [11] shown, although made a considerable time before the time when such knowledge is relevant."

The Court: There can be no question about the soundness of that rule of law, where a man who made the statement is available to testify, and there can be no danger in it, of course; but here is a different situation, where the man is dead, and is unable to testify. Doesn't that make all the difference in the world?

Mr. Herndon: I submit, it does not, your Honor, because the unfortunate circumstance that the man whose knowledge is in question is deceased, does not in any way affect the relevancy of the issue. The question of what he knew we can prove only by circumstantial evidence.

The Court: There is no question about its relevancy. The question is whether you can prove it or not. But isn't it a fundamental principle that you can't bring into court the statement of a deceased in an action involving the executor of his estate? Isn't that a fundamental principle of evidence in California?

Mr. Herndon: I think not. I think the decision by Judge Wilbur in the Gill case, to which I referred in the pre-trial brief, where knowledge is in issue, the question of the decedent's knowledge, statements made by him indicating his knowledge of the fact, are admissible. State-

(Testimony of H. C. Ludden)

ments made to him, which knowledge brought to his attention the fact in question, are admissible. [12]

The Court: In order to save time, suppose we do it this way: There being no jury here, and certainly it would not have any affect upon the court, in order to save the necessity of bringing this man back, let us take this testimony with the understanding that I am going to take the ruling on the matter under advisement, subject to a motion to strike. Then you gentlemen can file any authorities that you may have on the subject. I think this is a very close point, and that it ought to be carefully considered. I think it will save a lot of time. May it be so stipulated?

Mr. McGinley: So stipulated.

Mr. Herndon: Yes.

The Court: It will be admitted subject to a motion to strike. With that understanding, Mr. Witness, you may answer.

A. Mr. Lutz came in and simply handed me the prescription, and made the remark that he did have a pain in his chest, and would like to have the prescription as soon as possible.

Q. By Mr. Herndon: Did you have occasion to refill the prescription for nitroglycerine, which has been identified as Plaintiff's Exhibit No. 7 for identification?

A. Many times.

Q. How many times would you estimate, Mr. Ludden, did you refill the prescription which is Plaintiff's Exhibit [13] No. 7 for identification, between June 1, 1942 and October 31, 1942, if you can estimate it?

A. That would be pretty hard to state.

Q. Would you say as much as twice?

A. I would say about four times.

(Testimony of H. C. Ludden)

Q. And on any of those other occasions did Mr. Lutz make any statement to you with respect to suffering from any pain of any kind?

Mr. McGinley: If your Honor please, may it be understood that the objection I previously made goes to this line of interrogation?

The Court: The same objection may be shown to have been made, and the same ruling and the same stipulation.

A. Not that I recall.

Q. By Mr. Herndon: In what sort of package or bottle are the nitroglycerin tablets referred to in Plaintiff's Exhibit No. 7 placed when you deliver them to the purchaser? A. A small bottle.

Q. Do I understand it correctly that you testified that no part of the material which appears on the prescription is placed by you on the bottle?

A. There is no name put on the bottle. We don't put it on there.

Q. Will you tell us whether any part of the material which appears on the face of Plaintiff's Exhibit No. 7 for identification was placed by you on the bottle when you [14] filled this prescription and delivered it to Mr. Lutz?

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the question upon the following grounds: First, that it is incompetent, irrelevant and immaterial; secondly, that there has been no proper foundation laid for the question, and third, that the answer to the question at this stage of the proceedings would call for a disclosure of information which is privileged under section 1881, subdivision 4, of the Code of Civil Procedure of the State of California in that the documents which have been identified purport to be pres-

(Testimony of H. C. Ludden)

criptions from a physician who treated the decedent, Abe Lutz, in his lifetime, and any of the information appearing on the documents for identification which is expressive of the diagnosis or the treatment recommended for the deceased is subject to the prohibition of subdivision 4, section 1881, of the Code of Civil Procedure, and on the last ground, that the evidence called for by the question would not be the best evidence.

The Court: What have you to say about that?

Mr. Herndon: On the matter of privilege, if your Honor please, I do not understand that privilege extends to the information disclosed to a pharmacist. I don't understand that the statute so far extends, in the second place, to the matter of privilege. We have offered in evidence, and there has been received in evidence an [15] express waiver of the privilege by the patient, which is *prima facie* presumptively valid and binding upon the world, inasmuch as the person who gave that waiver presumptively intended to give it, and there is no person now living who has any right to challenge it or to dispute it, and more particularly, it has not been disputed or challenged here in any competent way. There is no competent way by which it can be done. In the next place, if your Honor please, if the validity or effectiveness of the waiver which is expressed in the policy depends upon the determination of any factual matter, which we submit it does not, that factual matter cannot be determined probably until the last witness in rebuttal is called in this case, so, *prima facie*, as the record now stands, clearly the evidence is admissible. So far as the best evidence rule is concerned, that rule does not mean as much as I think most lawyers think. It is a matter within the discretion of the court.

(Testimony of H. C. Ludden)

The Court: I think the objection is sound on the ground that the proper foundation has not been laid for the asking of the question. However, counsel may interrogate counsel for the defendant to find out if they do have the bottle available, before proceeding as a part of the foundation. On the other point, I haven't the California Code immediately in front of me, and I have forgotten just what its provisions were, but I do not remember that communications between a man filling the [16] prescription, a pharmacist, were privileged. So far as the privilege between the doctor and the patient is concerned, assuming for the purposes of argument that that privilege was not expressly waived in the application, there is still another principle of law which you run counter to. To illustrate, if another person is present at the time of the conversation between the doctor and the patient, the privilege is undoubtedly waived, and the third party may testify.

Mr. McGinley: Your Honor, I concede the rule in regard to disclosure made by the patient to a third person, that in some cases the privilege may be waived. Typical of those cases are those where the patient voluntarily puts his doctor on the stand and elicits information concerning his ailments and treatment, and then later should attempt to assert the privilege, courts hold that he is estopped to assert the privilege under this action.

The Court: That situation of which you speak is something entirely different. It is not a question of estoppel; it is a question of practical and substantive law.

(Discussion.)

The Court: Fortunately there is no jury here, and I am satisfied that the answer to this question is not going

(Testimony of H. C. Ludden)

to prejudice the court, who is used to these things. We are not going to be able to tell almost until the end of this trial just what the situation is going to be. I think we [17] had better take this evidence subject to a motion to strike, so may it be stipulated that we will reserve the ruling subject to a motion to strike, just as I did before?

Mr. Herndon: So stipulated.

Mr. McGinley: So stipulated, if your Honor please.

Mr. Herndon: I wonder if your Honor would propound the question to counsel as to whether this bottle in which this medicine was contained is in existence?

The Court: Yes, is this bottle in existence?

Mr. McGinley: Your Honor, I have never investigated. The deceased's son is here, if I may be permitted to ask him in open court?

The Court: Yes.

Mr. McGinley: Mr. Harry Lutz, do you have in your possession the bottles containing the medicine that your father took during the year 1942, and particularly during the months of June to October, 1942?

Mr. Harry Lutz: Not that I know of.

Mr. McGinley: During the noon hour can you make an examination and find if any of those bottles are available, or the containers which contained medicine during that period?

Mr. Harry Lutz: Yes.

Q. By Mr. Herndon: Mr. Ludden, do you know the practice among pharmacists generally, as it existed during 1942 with reference to placing instructions, or any matter

(Testimony of H. C. Ludden)

or material on a bottle or container of medicine, as set forth in the [18] prescription?

A. We only put on the direction that the doctor gives us, unless he so states on the prescription that we shall label what it is; otherwise we do not do so.

Q. Do I understand your answer to be that you place on the bottle only the directions for its use, unless the doctor specifies something else be placed on it?

A. Yes, sir.

The Court: You are familiar with the custom among the reputable pharmacists, are you not? A. Yes.

Q. That is the universal custom? A. Yes.

Q. Where you have nitroglycerine in the prescription, do you put any danger signal on the bottle such as Danger, Poison, Caution? A. Not necessarily.

Q. What is the custom?

A. We put on the doctor's directions only.

Q. So far as you know, that is what you did in this particular case? A. Yes, sir.

Q. By Mr. Herndon: Mr. Ludden, will you refer to Plaintiff's Exhibit No. 7 for identification, and state whether any of the material appearing on the face of that exhibit was placed by you on the bottle which was delivered [19] to Mr. Lutz?

A. Nothing but the directions.

The Court: The number, the name, the doctor's name, the directions were all on there, were they?

A. Yes, sir.

(Testimony of H. C. Ludden)

Q. By Mr. Herndon: Please read to us the part or parts, if any, on that exhibit, which is Plaintiff's Exhibit No. 7, which you placed on the bottle.

A. The words: Prescription No. 89543. Dr. M. H. Rosenfeld. Dissolve one table under tongue for heart pain. Mr. Lutz. 6-1-42.

Q. Do I understand that that portion of the exhibit which you have just read was placed by you on the label of the bottle? A. Yes, sir.

Mr. Herndon: That is all.

The Court: You may cross examine as to those particular questions. You may cross examine without prejudice, under the stipulation, because we won't bring the man back, so if you have any questions on cross examination as to those matters about which you objected, you may cross examine without prejudice. May it be so stipulated, gentlemen?

Mr. McGinley: So stipulated.

Mr. Herndon: So stipulated. [20]

Cross-Examination

Q. By Mr. McGinley: Mr. Ludden, referring to the conversation that you state occurred with the deceased, Mr. Lutz, at the time he first brought in the prescription, I understood that it was your statement that the deceased said he had pain in the chest, is that right?

A. Yes, sir.

Q. You are quite sure it was pain in the chest, instead of pain in the heart?

A. So far as I know, he did not mention the heart.

Q. And on the bottle of medicine which you filled from the prescription what is your best judgment as to

(Testimony of H. C. Ludden)

whether you made the prescription "Pain in the chest" or "Pain in the heart"?

A. For heart pain, as the prescription is written. The directions of the doctor are for heart pain.

Q. Is it always your policy, Mr. Ludden, to put the nature of the illness of one who has a prescription filled in addition to the directions on the bottle?

A. Not unless the doctor so states.

Q. Would you refer to the prescription which counsel has handed to you, and read into the record any directions from Dr. Rosenfeld referring to placing the inscription "Pain in heart" or "Heart pain" on the bottle?

A. Do you mean you want the directions as he has written them here? [21]

Q. I understood you to say that you don't put the nature of the illness, or the complaint, unless the doctor directs?

A. That is correct.

Q. Will you examine Dr. Rosenfeld's prescription and read into the record, if there are any directions there, directions to you to inscribe on the bottle of medicine "Heart pains" or "Pains in heart"?

A. Dissolve one table under tongue for heart pains.

Q. Was it that part of the prescription that you construed as the direction to you to put the inscription on the bottle?

A. It is, sir.

The Court: In other words, you took that to be the same thing as a direction such as "Take one tablet after every meal"?

A. Yes, sir.

Q. By Mr. McGinley: Do you keep as part of your records a copy of the matter that appears on the label on the bottle?

A. No, sir.

(Testimony of H. C. Ludden)

Q. Is there any record that you have, and which you keep as a part of your business records, where you make a duplicate prescription?

A. No, sir, not unless the patient asks for a copy of the prescription, which we sometimes are allowed to give, and sometimes we are not. [22]

Q. By the Court: In other words, you keep the original prescription in your file? A. Yes.

Q. You show it is filled, and do not make any copy of it unless the person who is asking for the prescription to be filled requests it, and you are allowed under the regulations to do it? A. Yes, sir.

Q. By Mr. McGinley: Mr. Ludden, do you have with you, other than the prescription, any communications with Dr. Rosenfeld regarding the decedent?

A. No, I think those other two prescriptions are from another doctor.

The Court: Speak up.

A. Other than those two prescriptions from some other physician. May I see those? No, sir, I haven't. That's the only prescription I have from Dr. Rosenfeld.

Q. By Mr. McGinley: In giving your testimony, Mr. Ludden, that in June of 1942 you placed this inscription on the bottle, that is based on your recollection rather than any records you have in your possession, is it not?

A. What do you mean, these directions?

Q. No, in giving your testimony, Mr. Ludden, that you placed the inscription of the type that you have testified to on the bottle, in June of 1942, you gave that testimony based on your recollection rather than based on any record that you [23] have in your possession?

(Testimony of H. C. Ludden)

A. I have got the record here. The prescription the physician signed is a prescription we always put on—what the directions are. There is no guesswork about it. It must go on that way.

Mr. McGinley: That is all, your Honor.

Mr. Herndon: May I ask a question which perhaps I should have asked on direct examination?

The Court: Yes.

Further Direct Examination

Q. By Mr. Herndon: Mr. Ludden, I ask you to examine Plaintiff's Exhibit No. 7 for identification, and state whether or not that exhibit is in the same condition now that it was when it was handed to you by Mr. Lutz?

A. It is, yes, sir.

Q. Have you produced all of the prescriptions that you can find, which you filled for Mr. Lutz?

A. I have.

Mr. Herndon: That is all, your Honor.

The Court: Is the same thing true of the other two prescriptions, that they are in the same condition as when you received them? A. Yes, sir.

Mr. Herndon: Before the witness leaves the stand, your Honor, I would like at this time to offer in evidence Plaintiff's Exhibits 5, 6 and 7 for identification. [24]

Mr. McGinley: If your Honor please, may it be understood that the offer in evidence is subject to the previously stated objection?

The Court: It may be so stipulated, and the same ruling, and the same receipt subject to a motion to strike.

Mr. Herndon: So stipulated.

(Testimony of H. C. Ludden)

Q. By the Court: Do I understand that these prescriptions were kept as a regular custom and practice in connection with your drug store, and that they are part of the records of the Marvel Drug Company? A. Yes.

Q. Kept in the regular course of business?

A. We have to keep them. That's the law.

The Court: They may be received subject to the stipulation.

The Witness: May we have these prescriptions back?

The Court: You may have them after the case is concluded. They will be kept by the clerk, just as safely as though in a vault. [25]

* * * * *

MAURICE H. ROSENFELD,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name.

A. Maurice H. Rosenfeld.

Direct Examination

Q. By Mr. Herndon: What is your profession?

A. Physician.

Q. Are you licensed to practice your profession in the State of California? A. Yes, sir.

Q. How long have you been so licensed?

A. Since 1929.

Q. Will you state generally what your medical training and experience has been?

A. I have had post-graduate work in internal medicine and the subject of heart disease.

(Testimony of Maurice H. Rosenfeld)

Q. Do you specialize in diseases of the heart?

A. I do.

Q. Do you exclude other practice? A. No, sir.

Q. You have some general practice?

A. The practice of internal medicine, sir.

Q. The general practice of internal medicine, but you specialize primarily, do you not, in the heart?

A. Yes, sir. [44]

Q. Where do you maintain your office?

A. 1908 Wilshire Boulevard.

Q. For how long have you officed at that place?

A. Approximately eight years.

Mr. Herndon: I take it, your Honor, perhaps, counsel will stipulate to Dr. Rosenfeld's professional qualifications?

Mr. McGinley: So stipulated, your Honor.

The Court: The stipulation will be received.

Q. By Mr. Herndon: Did you know Abe Lutz in his lifetime? A. Yes, sir.

Q. About how old a man was he at the time of his death?

A. I would have to look at my records for that, sir.

Q. Approximately.

A. I would have to look at my records for that sir.

Mr. McGinley: Your Honor, this is probably an appropriate time for me to make an objection which I would like to have continued with the doctor's testimony. May I state my grounds now?

The Court: Yes.

Mr. McGinley: If your Honor please, the defendants and counterclaimant Harry Lutz, object to Dr. Rosenfeld's testimony on disclosing any information acquired from Abe Lutz, the deceased, in his lifetime, which was neces-

(Testimony of Maurice H. Rosenfeld)

sary to administer and prescribe treatment, on the following grounds: [45] (1) That the disclosure of such matter constitutes privileged communications under Sub 4, Sec. 1881, of the Code of Civil Procedure. (2) That Dr. Rosenfeld, being a licensed physician, and coming within the terms and provisions of Sec. 1881, Sub 4, is not competent to testify as to such matters, on the ground that they are privileged. (3) That under the section quoted the testimony to be given by the doctor would be also incompetent; and, lastly, that any testimony or disclosure of information obtained by Dr. Rosenfeld from the deceased, Abe Lutz, during his lifetime, at the time when the relationship of physician and patient existed, subsequent to November 16, 1942, is not part of the *res gestae*, and constitutes hearsay, and is not binding on the defendants and counterclaimant in this proceeding. I would like, if it is agreeable to your Honor, so I won't interrupt, to have that continuing objection to all of the testimony which Dr. Rosenfeld will give.

The Court: May it be stipulated that the objection indicated by counsel for the defendants may be deemed to run to each and every question of the doctor; and that the testimony may be received subject to a motion to strike, just as he has done in connection with the other testimony relative to this matter?

Mr. Herndon: Plaintiff so stipulates.

The Court: Does the defendant so stipulate?

Mr. McGinley: So stipulated. [46]

The Court: You may answer. You know his age at the date of his death, don't you?

Mr. McGinley: Yes.

The Court: May it be stipulated to what it was?

(Testimony of Maurice H. Rosenfield)

The Witness: 65.

Mr. McGinley: I think it was 65.

The Court: Yes.

Q. By Mr. Herndon: When did you first become acquainted with Mr. Lutz? A. 1937.

Q. Will you state under what circumstances you became acquainted with him?

* * * * *

Q. By whom was he referred to you?

A. Dr. Fred Polesky.

Q. What did you say was the date of the first consultation? A. January 16, 1937.

Q. What complaints, if any, did the patient register at the time of that consultation?

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the last question on the grounds as follows: That a consultation in January, 1937, is immaterial to any of the issues to be tried in this case in [47] that the application which was made part and parcel of the policy in suit, specifically Question 36, is as follows: Have you consulted or been examined by a physician or other practitioner within five years? And the application is dated November 16, 1942, and the consultation concerning which the question is directed to occurred at a time beyond five years from November 16, 1942, and would not come within any of the purported representations in the policy.

Mr. Herndon: Counsel, if your Honor please, has overlooked Question 35, which is: Have you suffered from (a) Indigestion? (c) Nervous strain and depression?

(Testimony of Maurice H. Rosenfeld)

The Court: I am familiar with that. It may be received, subject to the same stipulation as to a motion to strike.

A. The patient complained of dizziness and inability to arise the week before the examination of January 16, 1937.

Q. By Mr. Herndon: Did the patient at that time relate to you any other history?

A. He was perfectly well, except for this one complaint.

Q. Which I believe you said was dizziness and vertigo?

A. Dizziness and vertigo and inability to get out of bed that morning.

Q. On that occasion did you make an examination?

A. Yes.

Q. Of what did that examination consist?

A. This was the week following that complaint. He had [48] a complete physical examination, a complete laboratory study and electrocardiograph study.

Q. Did you take his blood pressure? A. Yes.

Q. What was it? A. 134 over 90.

Q. You took an electrocardiogram? A. Yes.

Q. Do you have that with you, doctor?

A. I do.

Mr. Herndon: I will introduce this. It may be marked for identification?

The Court: It may be marked for identification.

The Clerk: Plaintiff's Exhibit No. 12.

Q. By Mr. Herndon: Did you read the electrocardiogram? A. Yes, sir.

Q. What did it show, if anything?

A. No significantly abnormal changes.

(Testimony of Maurice H. Rosenfield)

Q. Of what else did your examination consist?

A. Of the blood count, urinalysis, and fluroscopic examination of the chest.

Q. What was your diagnosis, doctor, if you made one?

A. Probable slight stroke.

Q. Will you tell us what a stroke is? What do you mean by that term? [49]

A. The breaking of the closure of a small blood vessel in the brain.

Q. From a medical standpoint, doctor, is the result of that ailment or stroke serious or otherwise?

A. This was suspected as being very mild.

Q. Is there any other name, medical name, for it?

A. Hemiplegia.

Q. Did you find any arteriosclerosis on the occasion of that examination? A. Yes.

Q. What is arteriosclerosis?

A. Hardening of the arteries.

Q. Is that disease of arteriosclerosis one which is transitory, or is it progressive or chronic?

A. It is progressive and chronic.

Q. What treatment, if any, did you prescribe for the patient on the occasion of your first consultation?

A. I advised rest and further observation.

Q. Did you prescribe any medicine? A. None.

Q. What, if anything, did you tell the patient with respect to his condition on the occasion of your first consultation?

A. He was advised that this condition had to be observed, first, to make sure that this was not a progressive condition, and to complete the diagnosis. [50]

(Testimony of Maurice H. Rosenfeld)

Q. Did you tell the patient that he had suffered a stroke?

Mr. McGinley: I object to that as leading and suggestive.

The Court: Objection sustained.

Q. By Mr. Herndon: What, as nearly as you can remember, did you tell the patient with respect to your conclusions as to his condition?

A. I advised the patient that he had a mild stroke, in that he had symptoms which were suggestive, and that together with the report by an eye specialist, who I had seen, suggested this condition, and for that reason I advised him of this possible diagnosis.

Q. Who was the eye specialist?

A. Dr. Stephen Seech.

The Court: Of this possible diagnosis—for the record, what do you mean by that? A. A stroke.

Q. By Mr. Herndon: When next did you see Mr. Lutz professionally? A. June 1st, 1942.

Q. What history, if any, did the patient relate to you on the occasion of that consultation?

A. The patient was complaining of pain in the heart region.

Q. What other history, if any, did he give you? [51]

A. He complained when on excitement, or on strain or effort, he was subject to pain around his heart region.

Q. Was there any indication by him as to the severity or otherwise of the pain? A. They were mild.

Q. Was there any indication by the patient as to the duration of time he had suffered such pain?

A. He just stated that they had lately occurred.

(Testimony of Maurice H. Rosenfield)

Q. Did you make an examination on June 1, 1942?

A. I did.

Q. Of what did it consist?

A. It consisted of a complete physical examination and an electrocardiographic study, and further study of his blood, his blood sugar, blood count and urinalysis.

Q. What did you find with respect to blood sugar?

A. He had an elevated abnormal blood sugar.

Q. What did you find with respect to blood pressure?

A. The blood pressure was slightly elevated.

Q. Have you a record of what it was?

A. 166 over 90.

Q. How much does that vary from normal, considering the age of the patient?

A. It is only slightly above normal.

The Court: Systolic? A. Yes.

The Court: The diastolic was normal? [52]

A. Yes.

Q. By Mr. Herndon: Did you have an electrocardiogram? A. Yes, sir.

Q. Have you it with you? A. Yes, sir.

Q. What, if anything, does it show with respect to the condition of the heart?

A. It shows a slight abnormality of the heart.

Q. Of what kind or character of abnormality?

A. In view of the medical history this would be suggestive of a mild coronary ischemia.

Q. Explain that to us a little further, doctor.

A. That is a deficiency of blood supplied to the heart muscles, because of the narrowing of the coronary arteries.

(Testimony of Maurice H. Rosenfeld)

Q. Could that be properly described as a recognized disease of the circulatory system? A. Yes, sir.

Q. State whether or not such disease is considered by the medical profession to be transitory, chronic or otherwise? A. The ischemia is transitory.

Q. Is there any part of the disease which is chronic?

A. The probable narrowing of the coronary arteries is chronic.

Q. In your opinion is such narrowing of the arteries [53] likely to be progressive in character or otherwise?

A. Probably progressive.

Q. Have you fully stated to us the diagnosis you made on that second consultation in June, 1942?

A. The diagnosis was probably angina pectoris, probably due to the coronary artery narrowing.

Q. What, doctor, is angina pectoris?

A. It is an acute pain, complained of by the patient, referable to the heart region, that is usually brought on by emotional strain, unusual effort, or overeating.

Q. What are the symptoms of this disease?

A. Pain in the region of the heart.

Q. Is that pain severe or otherwise?

A. It varies; it may be very intense; it may be very mild.

Q. What treatment, if any, did you prescribe on that occasion, doctor?

A. He was to curtail his activities; he was put on a diet to reduce weight, and to improve this potential diabetic condition. He was also given nitroglycerin for relief of the pains of angina pectoris.

(Testimony of Maurice H. Rosenfeld)

Q. Now I show you, doctor, Plaintiff's Exhibit No. 7 in evidence, and I will ask you whether or not you have previously seen that exhibit? A. Yes, sir.

Q. By whom was it prepared, if you know—that is to [54] say, the handwriting thereon?

A. It is my writing.

Q. Did you deliver that prescription to Mr. Lutz?

A. Yes, sir.

Q. On the date of your second consultation in June, 1942? A. Yes, sir.

Q. What, if anything, did you tell the patient about his condition at that time?

A. He was explained that the pain that he complained of was due to the heart itself, and that the diagnosis of angina pectoris was suspected. He was also told about the potential diabetic condition.

Q. When next did you have occasion to examine or see Mr. Lutz in your professional capacity?

A. He was seen again on June 5, 1942.

Mr. Herndon: Pardon me, your Honor, I neglected to give the second electrocardiogram. You have now handed me an electrocardiogram dated June 1, 1942, as the one to which you have previously referred in your testimony.

A. That's right.

The Court: It may be received under the stipulation, and marked in evidence.

Q. By Mr. Herndon: Of what complaints, if any, did the patient complain on the occasion of your third consultation? [55] A. He had none.

(Whereupon an adjournment was taken until 2 o'clock p.m. of this same day.) [56]

AFTERNOON SESSION

2:00 P. M.

MAURICE H. ROSENFELD

recalled.

Further Direct Examination

Q. By Mr. Herndon: Doctor, pursuant to subpoena, have you brought with you any other electrocardiograms than those which we have heretofore referred to?

A. Yes, I have.

Q. Will you produce them at this time, please? How many of them are there, doctor?

A. There are five, sir.

Mr. Herndon: If your Honor please, for the purpose of saving time, and for convenience, may these five electrocardiograms, bearing date June 3, 1942, June 5, 1942, July 6, 1942, July 12, 1942, and August 10, 1942, be marked for identification?

The Court: They may be received, as one or separately?

Mr. Herndon: Separately, if you please. May the reporter read the last question, your Honor?

(Question read by the reporter.)

Q. You may answer the question.

A. He had no complaints on that day. That was June 5, 1942. [57]

Q. Was that the time when you said he came back to get the results of his previous examination?

A. Yes.

Q. Ekg, and the other blood studies, you made no examination on that date, or did you?

A. No, that was just a report, an electrocardiogram recheck.

(Testimony of Maurice H. Rosenfeld)

Q. June 5, did you take another electrocardiogram?

A. I did.

Q. What, if anything, did you report to the patient on that day?

A. I mentioned the diagnosis of angina pectoris, and advised him about his activities, and its bearing upon this suspected heart condition.

Q. Do you recall whether or not you explained to him what angina pectoris was?

A. The condition was explained.

Q. I show you, Doctor, Plaintiff's Exhibit 13 in evidence, and I will ask you if it was that electrocardiogram that you took on your June 1st examination?

A. Yes, it was.

Q. Was it that electrocardiogram you discussed with Mr. Lutz on June 5th?

A. Yes, sir.

Q. I now hand you an electrocardiogram dated June 3, 1942, being Plaintiff's Exhibit No. 14 for identification, [58] and I will ask you when that was taken?

A. This electrocardiogram was taken along with the blood studies on June 3, 1942.

Q. Was Mr. Lutz in your office on June 3, 1942?

A. Yes, he was.

Q. Was any other examination made on June 3 than the taking of the electrocardiogram?

A. That was just laboratory studies done by my technician.

Q. Referring to plaintiff's Exhibit 14 for identification, will you state what, if anything, it shows with respect to the heart condition?

A. There is an abnormality in the electrocardiogram.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the witness testifying to what any of the electrocardiograms show, on the ground that there has been no foundation laid in that such information was communicated to the decedent, Abe Lutz. If I can add to that, not in the way of argument, but by way of explanation, I have assumed that this line of testimony is being offered to show knowledge on the part of the deceased applicant that he had certain infirmities in the heart. Now, it would be, I submit, your Honor, wholly immaterial if the doctor made a complete and thorough study of the electrocardiograms unless he explained to the applicant the study that he had made, and his opinion at that time as to what it showed, [59] unless it was communicated in those words to the applicant, it would be immaterial.

The Court: I think that the foundation, if it exists, should be laid, because it might be an important element. I shall not foreclose myself from saying what my opinion would be, if it were not, but let us see if the foundation can be laid first.

Q. By Mr. Herndon: Referring, Doctor, to Plaintiff's Exhibit No. 14 for identification, I will ask you whether you told Mr. Lutz, or explained to Mr. Lutz, what was indicated by that electrocardiogram?

Mr. McGinley: If your Honor please, I object to that as leading and suggestive.

The Court: I don't think so. He is asking him if he told him what that meant. Just answer yes or no.

A. Yes.

(Testimony of Maurice H. Rosenfeld)

The Court: What did you tell him?

A. The patient was advised that there was some abnormality in this cardiogram not seen in the previous studies which indicated that the pains that he complained of were due to his heart, and suggested angina pectoris.

Q. Did you, in each instance, where you took an electrocardiogram, show it to him and explain to him what your judgment was as to what it showed?

A. Every time he visited and a cardiogram was taken, an interpretation was explained to the patient. [60]

Mr. Herndon: Perhaps counsel does not desire that I show him each of these.

Mr. McGinley: May I ask one question related to my objection, your Honor?

The Court: Yes. You mean on voir dire?

Mr. McGinley: Yes.

Q. Dr. Rosenfeld, on the occasion that you are about to testify, when Mr. Abe Lutz was at your office, did you exhibit to him physically the electrocardiogram that you now have in your possession?

A. No, sir.

Q. You had that in your own personal file?

A. That's right, sir.

Q. And is this a fair statement of what you did: When Mr. Lutz came in, after your having personally examined the electrocardiogram, and you determined professionally what it meant, you conveyed that meaning to him personally without an exhibition of the electrocardiogram?

A. Yes, sir.

Q. Was that the practice which was followed with respect to all of the electrocardiograms?

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: In view of that, your Honor, we urge the objection previously stated, that the witness' interpretation of the electrocardiogram at this time, unless it was communicated to the decedent as to the readings of the [61] electrocardiogram, it would be immaterial.

The Court: I think they would be entitled to introduce them in explanation of the witness' testimony, although they would not have the same effect as though they had been shown, but only for that limited purpose they may be received.

Q. By Mr. Herndon: On what date was it, Doctor, that you explained to Mr. Lutz the meaning or the interpretation shown by Plaintiff's Exhibit 14?

A. On June 5, 1942.

Q. Then, Doctor, on June 5, 1942 did you take any other electrocardiograms of Mr. Lutz?

A. There was one taken on that date.

Q. I show you Plaintiff's Exhibit No. 15 for identification, and I will ask you whether or not that is the electrocardiogram taken on June 5, 1942?

A. Yes, it is.

Q. What other examination did you make on June 5, 1942, Doctor?

A. That was just the report of the entire previous examinations; also the report on the three electrocardiograms taken on June 1, June 3 and June 5.

Q. I believe you have heretofore testified that you explained to Mr. Lutz what was shown by those three electrocardiograms? A. I did.

Q. Now, I will ask you to tell us, Doctor, what is [62] shown by the electrocardiogram which is Plaintiff's Exhibit No. 14 for identification?

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: If your Honor please, that question is objected to on the ground—

The Court: The objection will be sustained. You may ask him what he told the patient, if you wish.

Q. By Mr. Herndon: Doctor, will you tell us what you told Mr. Lutz with respect to your findings, or your readings of the three electrocardiograms, which are Plaintiff's Exhibits Nos. 13, 14 and 15?

A. In view of the fact that these electrocardiograms showed variations, definite variations from the one taken in 1937, together with the history of pain about the heart on exertion, and on motion, the patient was informed that all of these things mean angina pectoris, and he was advised as to the care of this condition.

Mr. Herndon: At this time, your Honor please, I wish to offer in evidence—

Mr. McGinley: If your Honor please, the defendants urge the same objection that was heretofore urged with reference to the physical electrocardiograms.

The Court: Only for the limited purpose may it be received to explain the testimony of the witness. I understand you have now told us what you told him with regard to just one of these electrocardiograms, is that true?

A. No, sir, the interpretation of all four; the one in [63] 1937 was fairly normal, and the variation of these three.

The Court: They were all explained?

A. They were all explained.

Mr. Herndon: I now offer in evidence, your Honor, Plaintiff's Exhibits 12, 13, 14 and 15 for identification, which are the electrocardiograms to which the witness has just referred.

(Testimony of Maurice H. Rosenfeld)

The Court: They may be received and marked with the same numbers for the purpose indicated.

Q. By Mr. Herndon: Doctor, when next after June 5, 1942 did you see Mr. Lutz in your professional capacity? A. July 6, 1942.

Q. What history, if any, did the patient relate on that occasion?

A. The patient stated that he felt very much better, and that he was contemplating taking a vacation. He had cut down on his activities, and his symptoms had disappeared.

Q. What examination did you make on that day?

A. A clinical examination was made.

Q. Did you take an electrocardiogram on that day?

A. I have the electrocardiogram, sir. I would like to see the date.

Q. I now hand you Plaintiff's Exhibit No. 16 for identification.

A. This was the electrocardiogram taken on July 6, 1942. [64]

Q. I will show you an electrocardiogram dated June 12, 1942, being Plaintiff's Exhibit No. 17 for identification. I will ask you when that electrocardiogram was taken.

A. This was taken on June 12, 1942. I would like also to correct my previous statement that he had been seen after June 5. He was also seen on June 12, and at that time this cardiogram was taken.

Q. Did you make any other examination on June 12?

A. On June 12 he had a complete physical examination besides the electrocardiogram.

(Testimony of Maurice H. Rosenfeld)

Q. What were your findings on June 12?

A. They were essentially the same as those on June 5, except that the patient was having pain; their occurrence was less frequent.

The Court: Did you tell him your findings?

A. Yes.

Q. By Mr. Herndon: Did you on that occasion explain any electrocardiograms to him?

A. Yes, sir, after each taking I examined it, and the electrocardiogram was interpreted in language a layman would understand.

Q. Is that true with reference to Plaintiff's Exhibit 17 for identification? A. Yes, sir.

Q. What did you tell the patient with reference to Plaintiff's Exhibit 17 for identification? [65]

A. The instructions were the same as in the previous examination, as to the advisability of reducing his activity and he was again given nitroglycerine for his pain, and he was told that this cardiogram was very similar to the previous ones.

Q. When next, after June 12, did you see Mr. Lutz in a professional capacity? A. On July 6, 1942.

Q. Did the patient relate any history to you at that time?

A. The patient stated then that he was feeling very much better.

Q. Did he register any complaints, or tell you of any pains? A. No, sir, he had no complaints.

Q. Did you make an examination on that day?

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Q. Of what did it consist?

A. It consisted of a physical examination, and you have the electrocardiograms. I cannot recall from my record whether one was taken then.

Q. I will hand you Plaintiff's Exhibit No. 16 for identification, and I will ask you whether or not that electrocardiogram is the one which you say was taken on that date?

A. This one is the electrocardiogram taken on July 6, [66] 1942, in conjunction with the rest of the clinical examination.

Q. Referring to Plaintiff's Exhibit 16 for identification, did you tell the patient what was indicated by that electrocardiogram?

A. Yes.

Q. What did you tell him?

A. I advised him that this electrocardiogram showed no change from the previous electrocardiogram, and that he was to continue on his restricted activities.

Q. Did you make any change in your diagnosis after your examination of July 6, 1942?

A. I suspected the possibility of an acute coronary occlusion.

Q. What is the meaning of that term, Doctor?

A. An obstruction in one of the small coronary arteries that are in the heart.

Q. Did you continue to believe that the patient had arteriosclerosis and angina pectoris?

A. Yes, sir.

Mr. McGinley: I object to that upon the ground that no foundation has been laid; it is immaterial unless that information was communicated to the decedent.

The Court: You had better lay the foundation, and also as to the previous question.

(Testimony of Maurice H. Rosenfeld)

Q. By Mr. Herndon: Doctor, on the occasion of your [67] consultation with Mr. Lutz on July 6, 1942, did you tell the patient what your diagnosis and conclusions were?

A. No, sir, that was just for my own information, and a follow-up for further diagnostic evidence.

Q. By the Court: Did you subsequently tell him what your suspicions were? A. Yes, sir, I did.

Q. Did you tell him that they had been confirmed?

A. No, sir.

Q. You did not tell him that they had been confirmed by any examination or any history, or any electrocardiogram?

A. I just informed him of the suspicion which was based primarily on the slight change in the cardiogram which he was told about, and also about his clinical history.

Q. Just as nearly as you can, what did you tell him?

A. That in view of the fact that he was subject to pain around his heart that occurs after exercise or effort or after emotion, together with the minor changes noted in the electrocardiogram, that it was my opinion that these were due to the heart, and they were primarily due to a condition known as angina pectoris.

Q. By Mr. Herndon: When did you tell him what you have just stated?

A. First on June 5, and on each subsequent examination.

The Court: To and including the last time you saw him? A. Yes, sir. [68]

Q. By Mr. Herndon: When next after July 6 did you see Mr. Lutz? A. On August 7th.

(Testimony of Maurice H. Rosenfeld)

Q. Did the patient give you any history at that time?

A. The patient had no complaints at that time.

Q. Did you make any examination on that day?

A. A re-examination of the blood sugar was made at that time, and a physical examination.

Q. Did you communicate to Mr. Lutz on that day your conclusions or your opinion, as to what the examination showed?

A. The examination and the discussion on that day was primarily referable to the patient's diabetic problem.

The Court: What did you tell him?

A. I told him that his blood sugar was essentially normal.

Q. By Mr. Herndon: When next did you see Mr. Lutz? A. On August 11.

Q. Did the patient relate any history to you on that day?

A. The patient had no complaints. He was re-examined, and another electrocardiogram taken.

Q. Do you have that electrocardiogram in your file, Doctor? A. I do not, sir.

Q. I will show you Plaintiff's Exhibit No. 18 for [69] identification, and ask you if that is the electrocardiogram taken on that occasion? A. Yes, that is.

Q. Did you explain to Mr. Lutz your findings from the reading of this electrocardiogram, which is Plaintiff's Exhibit 18 for identification? A. Yes, sir.

Q. What did you tell him?

A. I advised him that the condition I suspected, and that he had been instructed about before, was primarily the same; that there was no increase in impairment noticed on these subsequent examinations.

(Testimony of Maurice H. Rosenfeld)

Q. Doctor, will you tell us whether or not the disease of angina pectoris is a transitory or chronic disease?

Mr. McGinley: I object to that, your Honor, upon the ground that no foundation has been laid, unless it is shown to have been communicated in the form asked to the decedent, Abe Lutz.

Mr. Herndon: If your Honor please, this witness has already testified to his opinion that the patient, Mr. Lutz, was suffering from this disease. I think the court is entitled to know now the nature of the disease.

The Court: You may answer the question.

A. May I have the question?

(Question read by the reporter.)

A. It is a chronic disease manifested by an acute [70] exacerbation of pain.

Q. By Mr. Herndon: You attended Abe Lutz in his last illness, did you not? A. Yes, sir.

The Court: Before you go to that, did you tell the patient what your opinion of angina pectoris was as to the future? A. Yes, sir.

Q. You told him that it was something that was not just transitory, but that it would be continuous and possibly progressively worse if he did not take care of himself, did you?

A. That is usually done in a way not to cause the patient to be too apprehensive, but that sort of message is impressed upon the patient, your Honor.

Q. By Mr. Herndon: Doctor, you attended Mr. Lutz in his last illness, did you not? A. Yes, sir.

Q. What in your opinion were the immediate contributing causes of the death of Abe Lutz?

A. An acute coronary thrombosis.

(Testimony of Maurice H. Rosenfeld)

Q. Were there any other contributing causes of death?

A. He was sent to the hospital because he had an acute duodenal ulcer; that is, an ulcer of the stomach.

Q. Will you tell us, Doctor, whether in your opinion Abe Lutz was suffering from arteriosclerosis during the period [71] from June, 1942 to October, 1942?

Mr. McGinley: That is objected to, if your Honor please, on the ground that there has been no foundation laid in that this witness has not testified that he stated, in the language of the question, that Abe Lutz had arteriosclerosis. Therefore, it would be immaterial.

The Court: Let us find out. He may answer the first question.

A. The patient did have arteriosclerosis.

Q. By Mr. Herndon: Prior to November 1, 1942, had you told Mr. Lutz that in your opinion he was suffering from arteriosclerosis? A. Yes, sir.

Q. In your opinion, Doctor, was Abe Lutz suffering from angina pectoris during the period between June 1, 1942 and November 1, 1942?

Mr. McGinley: That question, if your Honor please, is objected to upon the ground that there is no foundation laid, unless the witness is shown to have stated to the decedent that he was suffering from angina pectoris.

The Court: Let him answer the first question first; then ask him the second question.

Mr. Herndon: I think counsel has forgotten that the witness has already several times testified—

The Court: I thought he had.

Mr. McGinley: I will withdraw the objection, your Honor, [72] if I misquoted the witness.

(Testimony of Maurice H. Rosenfeld)

The Court: I don't think you misquoted him intentionally. You may answer the question.

A. May I have the question, sir?

(Question read by the reporter.)

A. Yes, sir.

Q. By Mr. Herndon: Have you an opinion, Doctor, as to whether or not the diseases of arteriosclerosis and angina pectoris contributed to the death of Abe Lutz?

A. Yes.

Q. What is your opinion?

Mr. McGinley: That is objected to, your Honor, upon the ground that it is immaterial.

The Court: Objection overruled.

A. The condition that was the actual cause of death was just a continuation of the process of angina pectoris.

Q. By Mr. Herndon: Would you answer my question as to whether or not in your opinion Mr. Lutz was suffering from arteriosclerosis and angina pectoris during the period from June 1, 1942 to November 1, 1942, if I had limited the period to November 1, 1942 and December 9, 1942?

Mr. McGinley: That is objected to, if your Honor please, on the ground that the question covers a period not covered by the examinations of this gentleman. He has not testified, as I recall the record, that he examined him in November of 1942, but that the last examination was August 11, [73] 1942, and therefore his opinion would be a matter of surmise and conjecture.

Mr. Herndon: I submit that is not correct, your Honor; this witness testified he attended the patient in his last illness, and he testified to a long series of examinations previously.

(Testimony of Maurice H. Rosenfeld)

The Court: I think the objection is rather to the weight to be given to the testimony than to its admissibility. But I am not sure that the question is very clear.

Mr. Herndon: I will withdraw it, because it is rather awkward and unintelligible.

Q. I will ask it this way: Whether you have an opinion as to whether Abe Lutz was suffering from arteriosclerosis and angina pectoris during the period between November 1, 1942 and December 9, 1942?

Mr. McGinley: That question, if your Honor please, is objected to on the additional ground that the opinion of this gentleman during the time mentioned would be wholly immaterial as far as the frame of mind of the decedent is concerned. I have assumed that this evidence is proper on the phase of the case showing knowledge. An independent opinion in the mind of Dr. Rosenfeld during the month of November, 1942, not communicated to the decedent, I submit respectfully would not tend to prove or disprove anything with regard to the mental frame or knowledge of the decedent during that period.
[74]

The Court: It may and it may not. I can't be sure. Of course, you can't put in all of your case at one time. Assume now that he says in his opinion, from November until December, he was suffering from arteriosclerosis and angina pectoris, and from December until the time of his last illness he was suffering from it also; that it just was progressively greater, and that when he came to see the man in his final illness he told him it was just the same old disease he had had right along, just getting progressively worse; after all, you can't do it all at one time. We may have to strike it out, but I think he is

(Testimony of Maurice H. Rosenfeld)

entitled to develop it. The objection is probably sound, yet I don't know how we are going to get at it any better. Let us have an answer to the question.

A. It is my belief that the patient had those conditions during those dates.

Q. By Mr. Herndon: Doctor, what is the significance of the eye changes which you referred to in your testimony this morning?

A. They are one of our best methods of diagnosing the process of arteriosclerosis.

Q. Can you tell us in layman's language what those eye changes are?

A. By means of a certain instrument a physican can examine the eyegrounds, where the arteries and veins are found, and there by direct vision an estimate as to the [75] degree of arteriosclerosis can be made, as well as with other changes in the retina, and a physician can definitely state the degree of arteriosclerosis in that patient.

Q. Did you find such evidence of eye changes in Abe Lutz?

A. Yes, sir.

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to that upon the same ground last urged, unless that information was communicated to the patient.

The Court: I had understood this morning that he said he had, but let us develop it and find out; as I understand it, you diagnose a great many diseases, or are assisted in your diagnosis of a great many diseases by a diagnosis of the eye; that is particularly true on account of the little arteries in the sensitive part of the eye, and

(Testimony of Maurice H. Rosenfeld)

in arteriosclerosis these respond very quickly to the condition of arteriosclerosis, is that so?

A. Yes.

Q. Did you explain that to the patient at any time in 1937?

A. Your Honor, when he was first seen, I made a note, I believe, this morning, that he was seen by an eye specialist who had communicated to me the findings that he had discovered on the examination, and that information was conveyed to the patient, not only by me, but by the eye specialist. [76]

Q. He told you that, did he, in the course of his relation of his history—he told you what the eye specialist had told him?

A. No, sir, I had a direct communication to the eye specialist.

Q. By Mr. Herndon: To whom do you refer by the eye specialist?

Mr. McGinley: I move to strike the answer of the witness to the last question, in its entirety, pertaining to what he was told by the eye specialist, on the ground that it is hearsay.

The Court: That portion may be stricken referring to what the other doctor told him. The only thing you may relate here is what the patient told you had been told him by the other doctor.

A. The patient told me nothing about the findings.

Q. By Mr. Herndon: I think there is an unanswered question. I ask you, Doctor, whether you found evidence of eye changes in your examination of Mr. Lutz?

A. My own examination, following the examination by the eye specialist, was confirmatory of his findings.

(Testimony of Maurice H. Rosenfeld)

Q. I understand your answer to be that you did find evidence of eye changes? A. Yes, sir.

Q. Who was the specialist to whom you have just referred? [77] A. Dr. Stephen Seech.

Q. Doctor, what significance, if any, does the history of gas pains have in reference to the heart condition?

Mr. McGinley: I object, your Honor, upon the ground that there is no foundation.

The Court: Objection sustained.

Mr. Herndon: I am in this position, if your Honor please, a subsequent witness, as a matter of fact, the defendant and counterclaimant Harry Lutz, has testified in his deposition that his father suffered from gas pains and with that avowal I wonder if I might interrogate the witness on the subject matter, to be stricken if I do not connect it up?

The Court: Yes, you may, if you promise to connect it up, subject to a motion to strike. Of course, I don't think the form of the question is very fortunate. Re-frame it, please.

Q. By Mr. Herndon: In your opinion, Doctor, would a history of having gas pains related by Abe Lutz, have any significance in reference to your diagnosis of a heart condition?

Mr. McGinley: If your Honor please, may I urge the objection that there has been no foundation laid in that the witness has not testified, as I recall, that Mr. Abe Lutz complained of gas pains. I may be mistaken.

The Court: I think the objection is sound. Ask him [78] the question directly; it isn't leading, ask him if he complained to him of gas pains at any time.

(Testimony of Maurice H. Rosenfeld)

Q. By Mr. Herndon: At any of these consultations did the patient tell you that he had suffered gas pains?

A. He made mention of that complaint.

Q. What, Doctor, is the significance, if any, of complaints of gas pains, relating such complaints to your other findings and examinations of Mr. Lutz?

A. A gas pain is a general complaint of a patient. However, when it occurs on effort or on emotion, it becomes obvious that the stomach is not the thing at fault, but the heart. However, most patients who complain of pain or a peculiar sensation, that is hard for them to describe, and they usually say it is gas pains primarily because of belching, and they say, "I feel badly." This is a very common fallacy and the differential point is that gas pains usually are associated in close relation to the intake of food, where the gas pain as caused by heart disease is related to emotion and strain.

Q. Doctor, have you produced, pursuant to subpoena, records of your consultations with Mr. Lutz in January of 1937, June of 1942 and August of 1942?

A. Here are all my notes.

Mr. Herndon: I have shown counsel the notes which you have just handed me, comprising four pages, the first dated record being 1/16/37, and the last date being recorded [79] 5/10/44.

Q. I will ask you whether or not those notes were kept by you in the regular course of the practice of your profession? A. Yes, sir.

Q. When, Doctor, with reference to your consultations with Mr. Lutz, were these entries made?

A. The same day of his coming to the office.

(Testimony of Maurice H. Rosenfeld)

Q. I assume you make a practice of keeping case records of each of your patients? A. Each visit.

Q. Were all of the entries made on these four pages which you have just handed me made by you, or under your direction?

A. They were made by me to my secretary.

Q. Dictated by you? A. Dictated by me.

Q. You have since read them over? A. Yes, sir.

Q. You found them to be true and correct transcripts of your dictation? A. Yes, sir.

Mr. Herndon: I offer these in evidence, if your Honor please, as one exhibit, Plaintiff's next exhibit in order.

Mr. McGinley: If your Honor please, might I ask one or two questions for the purpose of ascertaining if these are [80] original records, to make sure?

The Court: Yes.

Q. By Mr. McGinley: Dr. Rosenfeld, will you state whether or not the typewritten sheets which counsel has just exhibited to you are those of your original records, or is that a series of documents which have just been recently prepared?

A. No, they are the original records, and only records, and they were dictated and typewritten the same day that the patient came to the office.

Q. Do you have, as part of your file, notes or memorandum in your handwriting, that are made at the time that you have the consultation with the patient?

A. As I consult with the patient I make notes on a pad, and from those notes I dictate to my secretary, or on the dictaphone.

(Testimony of Maurice H. Rosenfeld)

Q. Do you have with you the original notes or memoranda that you made at the time that you consulted with the patient?

A. They are destroyed after they are dictated.

Q. And the four sheets that have been exhibited to you, does that constitute all of the memoranda in your file reflecting consultations with Mr. Lutz? A. Yes, sir.

Mr. McGinley: That is all.

Mr. Herndon: The exhibit has been offered, your Honor. [81]

The Court: Are you making any objection to the admission?

Mr. McGinley: Just subject to the general grounds that I stated at the commencement of the testimony.

The Court: I think they are sufficiently broad to cover it, although counsel has not pointed it up. It is a fundamental principle of the law of evidence that a witness may examine memoranda in order to refresh his recollection in order to testify therefrom. You can't have two bites of a cherry; you can't have the witness testify, and also admit the notes. The notes may be admitted on cross examination by opposing counsel, but they may not be admitted by the person who produces them. The objection will be sustained. If there is anything in those notes you want to bring out do it by the regular process, but not by admitting the notes.

Mr. Herndon: I would be in full agreement with your Honor's ruling, except for the shop book and record rules.

The Court: That has nothing to do with these. This is only being used to refresh the witness' memory. That is an entirely different situation. If there is anything

(Testimony of Maurice H. Rosenfeld)

more you want to bring out by the testimony of this witness, you show them to him, and let him refresh his memory.

Mr. Herndon: I seriously doubt, your Honor, that there is anything additional. I probably would be carrying coals to Newcastle to offer them. [82]

The Court: You can't do it under the rules of evidence. It is perfectly manifest why you can't do it, because you can't have two bites of the cherry. You can't have the witness testify from the notes, and put the notes in evidence also. The only reason the notes are used in evidence is to refresh the memory of the witness. Opposing counsel can put them in if he wants to on cross examination.

Mr. Herndon: Let the record show, if your Honor please, that I am returning the notes to the doctor.

The Court: Yes.

Mr. Herndon: At this time, if your Honor please, I wish to offer in evidence Plaintiff's Exhibits 16, 17 and 18 for identification.

The Court: They may be received subject to the same objection heretofore made. They will be received in evidence now under the same numbers.

Q. By Mr. Herndon: Dr. Rosenfeld, as part of your records, you have handed to me a letter dated March 9, 1943 from the Northwestern National Life Insurance Company. Is that a part of your record file?

A. Yes, sir.

Mr. Herndon: May I show it to counsel, your Honor?

The Court: Yes.

Q. By Mr. Herndon: Doctor, referring to this letter on the letterhead of the Northwestern National Life In-

(Testimony of Maurice H. Rosenfeld)

insurance Company, dated March 9, 1943, I will ask you whether or not [83] you received that letter?

A. I did.

Q. About what date?

A. I would have to see the letter, sir. Approximately March 9, 1943.

Q. Did you reply to that letter? A. I did.

Q. Do you have a copy of your reply?

A. No, sir.

Q. Do you know where it is? A. No, sir.

Q. Do you remember in substance what your reply was?

Mr. McGinley: That is objected to, if your Honor please, on the ground that it is not the best evidence; upon the further ground that it calls for hearsay testimony; on the additional ground that there has been no foundation laid establishing the identity of the purported writer, or the genuineness of the signature of the letter which counsel has exhibited to the witness.

The Court: Objection sustained.

Mr. Herndon: I will at this time offer the letter, if your Honor please, of March 9, 1943. May I hand it to the clerk?

Mr. McGinley: After your Honor has read the same may I make my objection?

The Court: Objection sustained. You can't prove it [84] that way.

Mr. Herndon: May it be marked for identification?

The Court: Yes, it may be marked for identification. Later the foundation may be laid, but at the present time it is not laid.

(Testimony of Maurice H. Rosenfeld)

Mr. Herndon: May I make an offer of proof, your Honor?

The Court: Yes.

Mr. Herndon: We offer to prove by this witness that in response to the letter which has just been marked for identification the witness replied and transmitted to the life insurance company a substantial report of his findings and the results of his examination of the patient, Abe Lutz, the purpose of it being to show, your Honor, that the witness, in reliance upon the authorizations, has disclosed the substance of the matters which are claimed to be privileged.

Q. By the Court: Did you ever, Doctor, have exhibited to you the signed written waiver of privilege by the deceased, Abe Lutz?

A. Before we give any information—I just don't keep all the waivers, as they usually amount to quite a few—we sometimes keep these waivers; sometimes we don't; but it is a general principle in my office that no information is given without a written waiver presented to me.

Q. You had a statement of some stranger to you apparently saying that he had such a waiver, but that does [85] not mean that the waiver was actually in existence, and that he had any such unless he showed the signed waiver to you of Abe Lutz. All he did was to say he had such thing, and ask you to reveal information on the strength of what he had? Did he show it to you?

A. These waivers are usually odd-sized pieces of paper that come in strips.

Q. He doesn't say in this letter he is sending it to you?

A. They usually, your Honor, send them along with the letter.

(Testimony of Maurice H. Rosenfeld)

Q. They don't say they ever had any such thing even. He says, "We are interested in having information concerning this, and we are authorized to write you for details in the following statement which appears over Mr. Lutz's signature in the application." He doesn't say he had a separate written waiver; all he says is that they had in their possession a waiver in an application; but that would not be sufficient if he did not exhibit it to you.

A. It is quite a time since that letter has been written, your Honor.

Q. You have no recollection whether you had anything additional from this letter?

A. Not specifically, sir.

The Court: The objection will be sustained.

Q. By Mr. Herndon: Doctor, since the death of Mr. Lutz [86] has any authorization for the full disclosure of information in your possession concerning Abe Lutz's medical history been presented to you?

Mr. McGinley: That question, if your Honor please, is objected to, first, on the ground that it calls for the opinion and conclusion of the witness; that it is asking this witness to interpret the interchange of correspondence; secondly, upon the ground that it is not the best evidence, and there has been no proper foundation laid which would show that the authorization was on behalf of the deceased, Abe Lutz.

The Court: The objection will be sustained. It must be clearly brought within the provision of law entitling a man to sign a waiver. If John Doe signs or produces a waiver, it would have no effect upon the privilege.

Mr. Herndon: That is all, your Honor.

(Short recess.)

(Testimony of Maurice H. Rosenfeld)

Cross-Examination

Q. By Mr. McGinley: If your Honor please, may I have the four sheets being the memoranda and notes of Dr. Rosenfeld, marked at this time for identification only?

The Court: Yes.

Mr. McGinley: I will hand them to the clerk.

The Clerk: As one exhibit, Defendants' A, your Honor.

The Court: Defendants' A for identification. [87]

Q. By Mr. McGinley: Dr. Rosenfeld, I believe the first time that Mr. Abe Lutz consulted you as a patient was on January 16, in the year 1937?

A. Yes, sir.

A. And that consultation took place at your office at 1908 Wilshire Boulevard, Los Angeles, Cal.?

A. Yes, sir.

Q. Will you recite again the complaints that were first made by Mr. Lutz?

A. Dizziness to the extent that he was unable to get up out of bed, I think about a week prior to his coming to the office.

Q. Following that statement you made a general clinical examination? A. Yes, sir.

Q. Having in mind his age, Doctor, which at that time was 64, other than the finding that you made with respect to the condition which you have described, was his condition normal? A. No, sir.

Q. It was? A. It was not.

Q. In what respect was it not normal?

A. His eyeground findings, on examination of the eyes, by means of an ophthalmoscope; there were certain abnormalities found in the eyeground. [88]

(Testimony of Maurice H. Rosenfeld)

Q. On January 16, 1937, did you state to Mr. Lutz, "I have found an abnormality with reference to your eyes"? A. I did not, sir.

Q. As nearly as you can, Doctor, and in your own words, detached from what you knew professionally concerning his condition, what were your exact words to Mr. Lutz on January 16, 1937?

A. It is rather difficult, sir, to remember after all these years the exact words.

Q. In substance?

The Court: In substance, as nearly as you can remember, just what did you say? You may, Mr. Clerk, give the doctor his notes. He is entitled to have them if he wants to refresh his memory for any purpose.

A. The report was that his general condition was satisfactory. However, the question of a possible stroke had to be considered in view of the symptoms and the eye ground findings.

The Court: That is what you told him?

A. Yes, sir.

Q. By Mr. McGinley: You told Mr. Lutz that his condition was satisfactory with the exception of the stroke? A. Yes, sir.

Q. Doctor, did you mention the word "stroke" to Mr. Lutz?

A. Probably not in exactly those words, sir. [89]

Q. As nearly as you can what did you tell Mr. Lutz, if you did not use the word "stroke"?

A. It probably would have been that he had a slight injury to his brain, or there was a small spasm of the blood vessel in his brain.

(Testimony of Maurice H. Rosenfeld)

Q. You did not also tell him that you found a condition which you could, by prescribing treatment, take care of? A. Yes.

Q. And what did Mr. Lutz say in response to that?

A. I don't recall the exact words, but he apparently thought he would follow the suggestion, and that's the last I heard of him after that examination for a number of years.

Q. It is your policy, is it not, Doctor, when you find a condition involving a suspicion of heart infirmity not to make any statements which would make the patient unduly apprehensive? A. That is correct.

Q. And that was your attitude toward Mr. Lutz in January of 1937? A. Yes, sir.

Q. Nitroglycerine is prescribed for calming down the nerves, is it not, Doctor? A. No, sir.

Q. It is prescribed for high blood pressure?

A. Sometimes. [90]

Q. On your examination in January, 1937, did you find any evidence of Mr. Lutz being a potential diabetic?

A. No, sir.

Q. That occurred at a later examination?

A. Yes, sir.

Q. How many months elapsed before you saw Mr. Lutz again?

A. He was first seen January 16, 1937; then he reported back several days later, January 19, 1937, and the treatment was discussed. That was the subsequent discussion following the preexamination. I did not see Mr. Lutz until June 1, 1942.

(Testimony of Maurice H. Rosenfeld)

Q. Between January, 1937 and June, 1942, did you have occasion to talk to Mr. Lutz over the phone relative to the treatment you had prescribed?

A. Do you have reference to the treatment of 1937?

Q. Yes. A. I don't believe so.

Q. What was the first date in June, 1942, that you again consulted with Mr. Lutz?

A. He was in my office June 1, 1942.

Q. I believe you testified that he complained at that time of pain in the heart region, is that right?

A. Yes, sir.

Q. What were his exact words, or the substance of his statement? You can refresh your memory from your notes. [91]

A. His general complaint was of pain, and he pointed to his heart region. At that time he would describe it, "These are gas pains" or "I have a pain in this region," and he would point to his heart region.

Q. Did he not tell you on that occasion, Doctor, that he had these gas pains following his meals and on arising in the morning? A. He may have.

Q. When you had made the examination that you have previously testified to, during the month of June, 1942, your suspicions were that he had mild angina pectoris, is that correct? A. Yes, sir.

Q. And in coming to that opinion you attributed significance to the complaint of the patient that he suffered from gas pains? A. Yes, sir.

Q. During the month of June, 1942, the symptoms were not sufficiently strong enough, were they, Doctor, to enable you to say definitely that Mr. Lutz had angina pectoris? A. They were very mild.

(Testimony of Maurice H. Rosenfeld)

Q. And what treatment did you prescribe for that mild condition that you found to exist in June, 1942?

A. Restriction of activity, avoidance of severe exertion, and the administration of nitroglycerine for the relief of pain. [92]

Q. Your diagnoses at that time were still tentative, were they not, Doctor? A. Yes, sir.

Q. I believe the next time you saw Mr. Lutz was on June 5, 1942, is that correct? A. June 5.

Q. June 5, 1942? A. Yes, sir.

Q. Did you make an examination on that date?

A. No, sir.

Q. You made an examination on June 12, 1942?

A. Yes.

Q. On June 12, 1942 Mr. Lutz told you that he had been feeling better than he had on the previous visits, did he not? A. Yes, sir.

Q. And in your opinion, Doctor, did you attribute that condition to the relief the patient was obtaining from nitroglycerine?

A. No, sir, I believe it was due to the restriction of activity.

Q. On June 12, 1942, when he told you that he was feeling better, he did not complain of pain, did he?

A. No, sir.

Q. He did not complain about any pressure in the chest? A. No, sir.

Q. He did not complain, Doctor, about any dizziness [93] that he had previously complained of during the month of January, 1937? A. He did not.

Q. He did not complain of palpitation of the heart?

A. No, sir.

(Testimony of Maurice H. Rosenfeld)

Q. Now, the next time he saw you was on July 6, 1942, is that correct?

A. No, sir, it was June 12, 1942.

Q. June 12, 1942? I probably misstated, Doctor, the date. I meant to say June 12, 1942, when I was interrogating you about the conversation. I probably said June 12th. Did that confuse you in any respect?

A. I inferred that you were speaking of June 5.

Q. Then I will clarify it. You saw him on June 12, 1942?

A. Yes, sir.

Q. And it was on that occasion that he told you that he had been feeling better?

A. Yes, sir.

Q. Without repeating the three or four questions I asked you with reference to the complaint, it was on that occasion that he did not complain about any palpitation of the heart or pressure in the chest or pains in the heart?

A. That's right.

Q. I want to go directly to the next occasion when you consulted with Mr. Lutz. [94]

A. That was July 8.

Q. Was it July 8 or July 6?

A. July 6; pardon me.

Q. When he appeared on that occasion, isn't it also true that he told you he was very much improved?

A. Yes, sir.

Q. He did not complain on that occasion of having palpitation of the heart, did he?

A. Yes, he did not.

Q. And he did not complain of dizziness or pressure in the chest, or pain in the heart?

A. Occasional pain in the heart.

(Testimony of Maurice H. Rosenfeld)

Q. I believe that you had previously testified on direct examination that the symptoms had disappeared, is that correct?

A. Not completely; they had not completely disappeared. They were very much improved, and by that I wish to clarify that when I say the patient was better, I do not wish to infer that the symptoms had completely disappeared, but their frequency is greatly diminished, and the severity of the pain is less.

Q. Can you, from your notes, Doctor, tell us exactly, or in substance, what you stated to Mr. Lutz on July 6, 1942?

A. On that day I advised him to take a little vacation. He had been working hard. I suggested to him that these pains, the recurrence of them, particularly on emotion and [95] on overwork, were primarily due to the heart, and that the series of electrocardiograms that were taken suggested too that these pains were due to the heart, since they were different than the one taken a number of years prior.

Q. Will you refer to your notes and read the portion of your notes that refreshes your memory on the statement that you just made?

A. On July 6 the electrocardiograms show definite improvement over the previous one, particularly in Lead 4. I think he ought to go away for a little vacation. It is possible that he had a slight coronary occlusion. When he comes back I want to check the blood sugar and urine.

Q. Does that refresh your memory, Doctor, that you told Mr. Lutz that your interpretation of the electrocardiogram which was last taken showed an improvement?

A. Yes.

(Testimony of Maurice H. Rosenfeld)

Q. You told Mr. Lutz that? A. Yes, sir.

Q. The next consultation you have is on August 7, 1942? A. Yes, sir.

Q. He had no complaints on that occasion, did he, Doctor? A. He did not.

Q. He did not complain of palpitation of the heart?

A. No, sir.

Q. Dizziness? [96] A. No, sir.

Q. Pressure in the chest? A. Not on that visit.

Q. Or of pain in the heart? A. That's right.

Q. You made a blood sugar test and found it to be normal on that occasion? A. Yes, sir.

Q. In that blood sugar test you conveyed your interpretation of the fact that it was normal, to Mr. Lutz?

A. Yes, sir.

Q. And told him his blood sugar was normal?

A. Yes, sir.

Q. On August 7, 1942, having in mind the age of Mr. Lutz, to-wit, 64 years of age, is it your opinion that he was in a good state of health?

A. All except for the pains and slight electrocardiograph changes.

Q. And in so far as the patient was concerned, there were no subjective complaints which indicated to you that there was any infirmity in his heart?

A. On what date, sir?

Q. On August 7, 1942.

A. He had no pains on that particular visit.

Q. The next visit or consultation with Mr. Lutz, I believe, was on August 11, 1942? [97]

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Q. He had no pain on that date, did he?

A. He had, because I note in my chart here that he was told to continue taking nitroglycerine p.r.n., meaning whenever necessary; so if he had had no pain I would not have made this notation to take nitroglycerine, but in view of the fact that there is this notation here it means he may have had, not particularly on the day of the examination, but he had—in the occurrence of a week or a month, some pains, and hence the nitroglycerine was given.

Q. I understood you to testify, on direct examination, Doctor, that in your consultation with Abe Lutz on August 11, 1942, that the patient had no complaints. Is there anything in your notes with reference to August 11, 1942 which sets forth any complaints of the patient?

A. In trying to make a resume of a whole month, or over several years of watching a patient, it is very difficult to put down every single word that occurs, but there are certain notations which the physician has to find out, which will help out merely in looking over the record, and so, on this nitroglycerine, we don't put down exactly the date he has a pain, or every pain he may have, but generally the over-all picture was that the patient was improving, because of his curtailment of activity, and he was taking nitroglycerine on occasions whenever necessary; but he might not have said he had a pain that day; he might not have one for a [98] week; but the general over-all picture was he was better, but pains did occur, and when they did occur he was advised to take nitroglycerine.

Q. In your opinion, Doctor, is this a fair statement concerning the health and condition of Abe Lutz from June 5, 1942 to August 11, 1942, that he had improved?

A. Yes.

(Testimony of Maurice H. Rosenfeld)

Q. You do know, do you not, that when the patient came to see you in January, 1937, that he had complained of pain? I hand you your notes. You may refresh your memory, Doctor.

A. On what date?

Q. January 16, 1937.

A. He had no pain in 1937.

Q. When was the first date that you have a record of complaint of pain from the patient?

A. I have a note on June 1, 1942, where the patient complained that lately he has been getting pains around his heart.

Q. Will you read into the record just the expression that you have in your notes there with regard to the complaint of pain?

A. The exact wording is: "Lately he has been complaining of precordial pain."

Q. Your use of the word "precordial", that is something that originated with you; not with the patient?

A. That's right. [99]

Q. To clarify it, he didn't say, "I have a precordial pain"? A. No, sir.

Q. Referring to your notes of August 11, 1942, will you please state whether you found any similar memorial of complaint by the patient of pain, and if you did, will you read it into the record?

A. In 1942 I have no notes to that effect.

Q. And in giving the testimony you have given here today you have refreshed your memory by consulting your office notes, which were made at or about the time of the visits they purport to refer to?

A. I refreshed my memory only from these notes, because they are all I have.

(Testimony of Maurice H. Rosenfeld)

Q. Between August 11, 1942 and the last illness of Mr. Lutz, which was in May, 1944, did you see Abe Lutz? A. No, sir.

Q. What did you say?

A. I did not see him until April 7, 1944.

Q. You did not see Mr. Lutz between August 11, 1942 and April 7, 1944? A. That's correct.

Q. You have given as your opinion that Mr. Lutz had an attack of coronary thrombosis, Doctor, immediately preceding his death? A. Yes, sir. [100]

Q. Will you state the distinction between angina pectoris and coronary thrombosis, insofar as the symptoms are concerned?

A. In coronary thrombosis the pain is very intense and persistent. It may occur at any time, regardless of effort or emotion, as compared with angina pectoris, which occurs usually on emotion, and after exertion, and it is of short duration, and it usually does not assume the severity of the pain of an acute coronary thrombosis.

Q. Having in mind that the record shows, I believe, that Mr. Lutz died May 28, 1944, when did he have the attack of acute coronary thrombosis?

A. Probably several hours before his death.

Q. Doctor, it was not possible in August, 1942, from any examination that you could make as a heart specialist, to determine whether or not Mr. Lutz had coronary thrombosis, was it? A. I could not determine that.

Q. Doctor, is it not a fact that normal, healthy appearing people suffer from fatal attacks of coronary thrombosis without any previous symptoms of the attack?

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Q. And in any of the examinations that you made, from the first time that Mr. Lutz became your patient up until he had the fatal attack in May, 1944, there were no symptoms, subjective and objective, which you could ascribe to coronary [101] thrombosis?

A. That's true.

Q. From August 11, 1942 to April, 1944, did you prescribe any medicine for Mr. Lutz?

A. No, I did not.

Q. I understood you to testify you did not see him during that time? A. That's correct.

Q. Now, the last time that you saw Mr. Lutz before his fatal illness was on October 11, 1942, is that right?

A. I saw him in my office on April 7, 1944.

Q. 1944? A. Yes, sir.

Q. The last time you saw the decedent before November 16, 1942, which is the date of the application for insurance in this case, was on August 11, 1942, is that correct? A. That is correct.

Q. Will you describe to the court the appearance of Mr. Lutz, in so far as appearance can convey to a doctor his condition of health with reference to color, and so forth?

A. He was a normal appearing man in every way.

Q. And you found, did you not, Doctor, having in mind that he was 64 years of age, that his blood pressure was normal? A. Yes.

Q. Did Mr. Lutz indicate to you on August 11, 1942, [102] by any statement that he made, apprehension about the consultations he had had with you?

Mr. Herndon: That question is objected to as calling for a conclusion of the witness, and an opinion not with respect to any subject of expert testimony.

(Testimony of Maurice H. Rosenfeld)

The Court: Read the question, please.

(Question read by the reporter.)

The Court: I don't think it is very clear.

Mr. McGinley: May I withdraw the question, your Honor?

The Court: Yes.

Q. By Mr. McGinley: What was Mr. Lutz's weight on August 11, 1942?

A. I do not have the weight on that day. I have the weight of the previous month.

Q. What was that, Doctor, please?

A. 183½ pounds.

Q. Prior to August 11, 1942, had you found that there was sugar or albumen in the urine?

A. I found he had on one occasion excessive sugar in the blood.

Q. Doctor, can you refer to your notes and tell us the date when you made that finding?

A. June 3, 1942.

Q. And when you saw him on August 11, 1942, I believe you have testified that that condition had been corrected, and his blood sugar was normal? [103]

A. That is correct.

Q. During the month—

Mr. McGinley: If your Honor please, some of the questions I am now about to ask might not be properly cross examination, but inasmuch as I know the doctor is very busy, I was wondering if I could ask these questions so that the doctor would not have to come back again.

The Court: Yes, you can make him your own witness, and ask any questions you want to. I am not a

(Testimony of Maurice H. Rosenfeld)

stickler, when I have no objection, about that, particularly with medical testimony, particularly where the doctors are busy. Make him your own witness, and ask him the question direct.

Q. By Mr. McGinley: During the months of November and December, 1942, and January of 1943, what was the address of your office?

A. 1908 Wilshire Boulevard.

Q. During that period of time what was your telephone number? A. Exposition 1369.

Q. During that period of time what was the name of your medical nurse? A. Mrs. Moore.

Q. During that period of time did you have in your employ a nurse by the name of Miss Byington?

A. She is a bookkeeper.

Q. Was she your bookkeeper during that period of time? [104]

A. I think she has been in my employ probably about two and a half to three years.

Q. Do you know Mr. Harold Morgan, of the firm of Hayes & Bradstreet, Doctor?

A. I do not know Mr. Morgan.

Q. Did Mr. Morgan, during the months of November and December, 1942, and January, 1943, communicate with you, either orally or by written communication, relative to the health and condition of Abe Lutz, the decedent?

Mr. Herndon: I object to that upon the ground that it is wholly irrelevant and immaterial to any issue in this case and no foundation laid.

The Court: No foundation has been laid, unless you indicate how you are going to connect it up.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: I intend to connect it up, your Honor. I have taken the deposition of Mr. Morgan, and I have also subpoenaed him, and will show that he was the local agent, employed by Hayes & Bradstreet, who are general agents for the plaintiff in this case.

The Court: Very well, we will take it subject to a motion to strike in the event it is not properly connected up, or otherwise inadmissible, in order that the doctor will not have to come back. You may answer.

A. I don't recall any conversation with Mr. Morgan.

Q. By Mr. McGinley: Does your file reflect any written communications with Mr. Morgan during that period? [105]

A. No, sir.

Q. Did you, during that period of time, or at any time up until the present time, receive any communications from Hayes & Bradstreet, Los Angeles, California, with reference to the health and condition of Abe Lutz?

Mr. Herndon: May it be stipulated, your Honor, that the same objection goes to all this line of questions, and the same ruling, subject to a motion to strike, in order to save time?

The Court: Yes.

Mr. McGinley: So stipulated.

A. I don't recall. It is possible, because of the time element, and because I have no recollection in my notes of any such conversation.

Q. Your notes do not show any such conversation as that?

A. That's right.

Q. And your file doesn't disclose any written communication?

A. That's right.

Q. During that same period of time, Doctor, did you receive any letters or communications from the New England Mutual Life Insurance of Boston, the plaintiff

(Testimony of Maurice H. Rosenfeld)

in this action, with reference to the health, condition and treatment you prescribed for Mr. Abe Lutz?

A. I don't recall any.

Q. Will you kindly examine your file, and if there are [106] any copies of any communications, will you please produce them?

A. I don't have any communication, sir.

Q. When, for the first time, did the New England Mutual Life Insurance Company of Boston communicate with you with reference to your testimony in this case?

A. I received a form to fill out shortly after the death of Mr. Lutz.

Q. Will you refresh your memory from your files, and give us the approximate time when you received that communication from the New England Mutual Life Insurance Company of Boston?

A. The exact date has not been completed on this sheet, but I know it was subsequent to his death.

Q. That would be subsequent to May 28, 1944?

A. Correct.

Q. Prior to that time I understand there were no communications from the New England Mutual Life Insurance Company with reference to the health and condition of Abe Lutz, or any treatment that you had prescribed for him?

A. That's right, sir.

Mr. McGinley: If your Honor please, I have a document which I desire to have marked for identification, and I would like to make this explanation: The original has been brought forth in a deposition, but I have taken the liberty, because of the smallness of the print, in having it blown up [107] to twice its normal size.

The Court: It may be marked for identification as Defendants' next in order.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: I have shown it to counsel.

The Clerk: Defendants' Exhibit B.

Q. By Mr. McGinley: Dr. Rosenfeld, I hand you a document which has been marked for identification as Defendants' Exhibit B, and ask you to examine that document and state whether or not any of the writing in ink is in your handwriting? A. It is not.

Q. Will you please state whether you, at any time, saw the original of Defendants' Exhibit B?

A. No, sir.

Q. Doctor, it was not until the year 1944 that you were able to give a professional opinion of definite angina pectoris as distinguished from the tentative diagnosis of angina pectoris?

A. No, the diagnosis was confirmed by the history as well as the changes in the electrocardiogram, and which were minor but definitely confirmatory.

Q. Is it possible, Doctor, for a person to have mild angina and have a complete recovery? A. Yes.

Q. Many times a person will have all of the symptoms of mild angina pectoris, and over a period of time and [108] treatment, can completely recover, is that right?

A. That's true.

Q. When you diagnosed tentatively Mr. Lutz's condition as angina pectoris, during the year 1942, in definitely coming to the conclusion that he had angina pectoris did you ascribe some significance to the fact that he had died of coronary thrombosis?

A. It was my impression that one is frequently the forerunner of the other.

(Testimony of Maurice H. Rosenfeld)

Q. And when Mr. Lutz died from coronary thrombosis the previous tentative diagnosis that you had arrived at you changed to a definite diagnosis of angina pectoris?

A. Not exactly. The diagnosis of angina pectoris was established in my mind, that he had definitely that, and then he developed something, which with the history confirmed the diagnosis, while theretofore it was just narrowed.

Q. On August 11, 1942, in view of the then condition of health of Mr. Abe Lutz, you had not abandoned the thought that he would have a complete recovery, had you?

A. He was recovered from the pain, but whether a patient is recovered from a disease can only be taken when in exercising themselves, and having the same excitement, the same excessive weight he had before, the symptoms would never have reoccurred; then we have a right to assume that there is a recovery. However, when the patient has improved by way of cutting down his activities and his [109] emotions, and his weight, we cannot assume that the disease is cured, but that it is not aggravated.

Q. With reference to Mr. Lutz, he had cut down his weight and reduced his activity, had he not, under your treatment? A. Yes.

Q. And that was the condition that you found him in in August, 1942? A. That's right.

Mr. McGinley: May I show this document to counsel, your Honor? If your Honor please, may this document, being a certified copy of the local death record, be marked for identification?

The Court: It may be so marked.

The Clerk: Defendants' Exhibit C.

(Tèstimony of Maurice H. Rosenfeld)

Q. By Mr. McGinley: Dr. Rosenfeld, do you recall the occasion of your signing the medical death certificate following the death of Mr. Lutz? A. I do.

Q. Where—I mean with regard to the place, did you sign the document?

A. I don't recall whether that was in my office or at the Cedars of Lebanon Hospital. I believe, however, it may have been in my office.

Q. And at the time that you signed the death certificate you had your file in front of you? [110]

A. That I don't recall.

Q. Do you recall the period or duration that you noted for the angina pectoris at the time that you signed the death certificate? A. I don't recall it at present.

Q. Doctor, I am handing you a certified copy of the certificate of death which has been marked for identification as Defendants' Exhibit C, and will you examine the same and state whether or not the information in writing underneath the caption: Medical certificate, is in your handwriting? A. Yes, sir.

Q. And does the designation, M. H. Rosenfeld, show your signature? A. Yes, sir.

Q. After examining the document, what is your memory as to whether or not this document was filled out at the time that you had your file before you in your office at 1908 Wilshire Boulevard?

A. I don't recall the file being near me when this was filled out.

Q. Do you recall filling out the certificate at any other place? A. No, sir.

Q. What would your best recollection be, that you filled it out at your office?

A. I believe that would be the probability. [111]

(Testimony of Maurice H. Rosenfeld)

Q. Referring to the document, Defendants' Exhibit C for identification, what was the date that you filled out the medical certificate? A. That was May 29, 1944.

Mr. McGinley: At this time, if your Honor please, I offer in evidence for the purpose of impeachment the certified copy of the death certificate which has heretofore been marked for identification as Defendants' Exhibit C.

The Court: Are you back on cross examination again, or are you on direct examination still?

Mr. McGinley: I intended to offer it on cross examination and it was at the foot of my notes, so I want to apologize for having included it with my direct examination without calling it to your attention.

The Court: It may be considered that this question about the death certificate is on cross examination. It may be received.

Mr. Herndon: I have no objection whatever to the offered instrument, but I do object to it if it is offered for impeachment purposes.

The Court: It does not make an difference what it is offered for; it will speak for itself.

Mr. McGinley: If your Honor please, I have concluded with both my cross examination and the direct examination of Dr. Rosenfeld, but may I inquire if the record is clear that in interrogating the doctor I am being consistent with [112] having objected to the doctor testifying under the grounds that I have previously noted.

The Court: Other than the portion of the testimony which is brought out in direct, and also that portion of the cross examination which was designed to impeach, you can't protect yourself on that, because that has not anything to do with the falsity or truth of the statements.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: With that understanding I have concluded.

The Court: Any redirect examination?

Re-Direct Examination

Q. By Mr. Herndon: Doctor, when you stated in your testimony on cross examination that in consultations with Mr. Lutz subsequent to June 1, 1942 you found improvement, did you mean improvement of the underlying conditions, or did you mean alleviation or reduction of the symptoms? A. I meant the alleviation of symptoms.

Q. On your cross examination you used the term "precordial" pains. What does "precordial pain" mean?

A. It means pain around the heart region.

Mr. McGinley: Defendants' Exhibit A for identification has been referred to in cross examination, and therefore, if your Honor please, I should like to offer it as plaintiff's next exhibit, inasmuch as it illustrates and is connected to the matters covered on cross examination.

Mr. McGinley: May I inquire—

The Court: These are the doctor's notes. Do you want to introduce the notes? [113]

Mr. McGinley: No, your Honor, and I object to their admission on the ground that there is no foundation; that they are self-serving, and that the witness has testified orally to the matters, that his memory has been refreshed by this memorandum, and therefore it would be immaterial.

The Court: Yes, I think that he refreshed his memory by reference to the notes on cross examination, just as he had done before. They are marked for identification, and will remain here, of course, but I think it would just

(Testimony of Maurice H. Rosenfeld)

clutter up the record, and make that much more expense in connection with the record.

Mr. Herndon: We have no further questions of the doctor.

Mr. McGinley: May the doctor be excused?

The Witness: Your Honor, may I clarify one point?

The Court: Certainly.

The Witness: In the death certificate there are two questions, and so there will be no confusion, it says the duration of the coronary thrombosis, and the duration for angina pectoris. When these certificates are made out, and when the record is not at hand, for statistical purposes, where we want to give the duration, instead of saying it was 13 months or 16 months, we put down a year plus, meaning that it was more than a year, so it is not particularly binding, just as if you put down three days, or something like that.

The Court: These are for statistical purposes? [114]

A. That's right.

The Court: You mean by that that it had continued for more than one year, without committing yourself to whether it was ten or five or three? A. Yes.

Mr. McGinley: I might ask one question on that, Doctor: When you filled out the death certificate in May, 1944, is it not a fact that you would have specified the duration of angina pectoris as being two-plus, if there had been any symptoms prior to two years preceding May 29, 1944?

A. It would probably have been better if I had the exact date of his first visit.

Mr. McGinley: That is all. [115]

STEPHEN G. SEECH

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Stephen G. Seech.

Direct Examination

Q. By Mr. Herndon: What is your business or profession?

A. Physician and surgeon, specializing in ophthalmology.

Q. Are you licensed to practice your profession in the State of California? A. I am.

Q. For how long have you been engaged in practice in California? A. 20 years.

Q. Do you specialize in ophthalmology? [34]

A. Yes.

Q. What is ophthalmology?

A. The study of the eye.

Q. Where do you maintain your office?

A. 2007 Wilshire Boulevard.

Q. Did you know Abe Lutz in his lifetime?

A. I did.

Q. Were you ever consulted by him in your professional capacity? A. I was.

Q. When? A. On January 15, 1937.

Q. That was the date of the first consultation?

A. That's right.

Q. Mr. Lutz came to your office on that date?

A. He did.

Q. Did he at that time recite to you any complaints?

The Witness: Your Honor, being confidential information, may I reveal the facts given to me by him?

(Testimony of Stephen G. Seech)

Mr. McGinley: If your Honor please, to expedite the matter, may I inquire if counsel will be willing to enter into the same stipulation with regard to the testimony of the doctor is about to give as was had with reference to the testimony of Dr. Rosenfeld?

The Court: Subject to a motion to strike?

Mr. Herndon: Yes, we will so stipulate. [35]

The Court: The stipulation will be received. You may reveal the information, with that stipulation, Doctor.

A. He gave me information that two days ago he awakened with a dizzy head; he was nauseated. He had no difficulty in vision. He got his last glasses a few years before.

Q. By Mr. Herndon: What you have just stated, Doctor, constitutes the substance of what Mr. Lutz told you on January 15, 1937? A. Yes.

Q. Did you thereafter make an examination of Mr Lutz? A. I did.

Q. Of what did that examination consist?

A. The examination consisted of an examination of both of his eyes.

Q. Did you use an ophthalmoscope? A. I did.

Q. What was your diagnosis?

A. I have the information, what I found. I did not make any diagnosis; just put down my findings.

Q. What then were your findings?

A. Both pupils round, equal, reacted well; the media are clear; his fundi, both discs are well defined of normal color; in the fundus, several very tortuous vessels were seen, and a few punctate hemorrhages. The left fundus were normal. [36]

(Testimony of Stephen G. Seech)

Q. Based upon your examination and the complaints related by the patient, did you form any opinion as to whether the patient was suffering from any disease?

A. No.

Mr. McGinley: If your Honor please, in addition to the objection which counsel has made, the defendant objects to this question upon the ground that there is no foundation laid which would make it competent, if there is no showing that the doctor told the decedent, the patient—

The Court: Having said he had no opinion, it is not material.

Mr. McGinley: I did not hear that, your Honor.

The Court: He said no.

Q. By Mr. Herndon: Doctor, you have in your hand the notes that you have referred to, a card or a paper?

A. That's right.

Q. Will you state what that is?

A. That is my record.

Q. Did you make that record at the time of the consultation with the patient? A. I did.

Q. Did you record thereon the substance of the history and the conclusions reached by you?

A. I did record everything in my own handwriting.

Mr. Herndon: Your Honor, may I ask the witness to permit me to examine the notes? [37]

The Court: Yes, and let counsel for the other side see them also.

Q. By Mr. Herndon: Did you prescribe any treatment, Doctor, in this case?

A. I can't remember without the card. That was eight years ago.

(Testimony of Stephen G. Seech)

Q. Doctor, what significance, if any, did you give to the finding of punctate hemorrhage?

A. Your Honor, I was called upon to testify only upon facts; not to give an opinion. Do I have to answer that question?

The Court: In other words, you mean you were not called here as an expert? A. That's right.

The Court: You were called here only to testify to certain facts?

Mr. Herndon: I might state, your Honor, it is my understanding when the doctor was subpoenaed the question was raised concerning his compensation to which the reply was made, at my suggestion, that we would pay the doctor any reasonable charge for his time. If that enters into the doctor's unwillingness to express an opinion, for whatever it is worth, I now state in this case, as in all cases, we expect to pay a reasonable fee. I think that ethics permit us to do that, and that good morals and fair dealing require us to do that, and no more, no less. That is our [38] position with respect to that phase of it.

Mr. McGinley: If your Honor please, I wish to object on behalf of the defendants, that the opinion of the doctor on the matter included in the question would be immaterial to any of the issues; would be hearsay, as far as Harry Lutz, the beneficiary, is concerned, and there is no foundation laid that the opinion he is about to express was communicated to the deceased, which I assume would be for the purpose of showing knowledge.

The Court: I think the objection is sound.

(Discussion.)

The Court: I will take it subject to a motion to strike, only on the promise of counsel that he will properly connect it up so as to make it applicable to the decedent's

(Testimony of Stephen G. Seech)

death; otherwise, in my judgment it is not admissible. You may answer with that understanding.

The Witness: Your Honor, I was told they don't want any opinion from me; only the facts on my card. I did not study the card; I cannot give any opinion, unless your Honor wishes me to do so.

The Court: I can't make you have an opinion and give it, if you don't have an opinion.

Mr. Herndon: Your Honor, he stated that he had an opinion.

The Court: Did you have an opinion at that time, or is it your opinion now? [39]

A. That was 1937. Today is 1945. I do not recall what opinion I had at that time, because—

The Court: You don't need to interrogate any further, because the doctor says he can't remember what opinion he did have, so that is (period).

A. I can give only a hypothetical question.

The Court: You aren't being asked for that.

Mr. Herndon: I understand the testimony of the witness to be that he had an opinion, but he does not now recall what it was.

The Court: That is my understanding.

Q. By Mr. Herndon: Is that correct, Doctor?

A. I said that I had an opinion if we find something in the eye, but I don't recall, in 1937, what opinion I had about the patient.

Q. Would you be able, by referring to your notes, to refresh your recollection?

A. May I look at them, please? The patient, 58 years of age, came in and I found in one eye a few hemorrhages; those hemorrhages can indicate several condi-

(Testimony of Stephen G. Seech)

tions. It can indicate increased pressure of the arteries; it can indicate diabetes; it can indicate diseases of the blood system.

Q. What diseases of the blood system?

A. Pernicious anemia; leukoma.

Q. Arteriosclerosis?

A. Arteriosclerosis; that is, hardening of the arteries.
[40]

Q. Retinal sclerosis? A. Yes, sir.

Q. Do you have an opinion at this time as to whether or not your findings indicated in Abe Lutz arteriosclerosis or retinal sclerosis?

The Court: That question is not clear. As I interpret the question, it is, do you now know whether he then had that opinion, is that right?

Mr. Herndon: Yes, your Honor.

A. According to my findings that condition cleared up in his eye, on my examination of October, 1937. I do not recall whether I referred him to a medical doctor, but we always recommend the patient, when we find hemorrhages, to consult a medical man to find the cause of that condition in the eye.

Q. Do you recall what, if anything, you told Mr. Lutz with reference to your findings?

A. I do not recall what I told him, but we always tell the same thing to the patient that we found something wrong in the eye, and that a medical examination should be made to find the cause of that disturbance.

Q. When next, after January 15, 1937, did you see Mr. Lutz? A. February 1.

Q. Of the same year? A. Of the same year. [41]

(Testimony of Stephen G. Seech)

Q. What history, if any, did the patient give you on the date of your second consultation?

A. No history is recorded, except on findings.

Q. Did you make an examination on that day?

A. I did.

Q. Of what did that examination consist?

A. It showed that the right fundus showed only a punctate hemorrhage.

Q. When next after February 1, 1937, did you see Mr. Lutz? . . . A. October 11.

Q. 1937? . . . A. 1937.

Q. On that date did the patient, Mr. Lutz, give you any history or complaints? . . . A. No, no complaints.

Q. Did you make an examination?

A. I did make an examination.

Q. Of what did that examination consist?

A. The examination showed that the hemorrhages cleared up.

Q. When next did you see Mr. Lutz?

A. May 21, 1938.

Q. May 21 or 31? . . . A. May 21, 1938.

Q. On that occasion did the patient register any [42] complaints? . . . A. He was complaining of dizziness.

Q. Did you make an examination on that occasion?

A. I did.

Q. Of what did that examination consist?

A. The eye grounds were normal; the tension in both eyes was 15, which was normal vision in each eye; with glasses it was 20/20. My study of the visual field would show normal limits; no enlargements of the blind spot; no scotoma; the color perception was normal.

(Testimony of Stephen G. Seech)

The Court: In other words, so far as dizziness was concerned, the finding was negative?

A. That was my finding.

Q. By Mr. Herndon: You mean to say, Doctor, that the objective findings were negative?

A. May 21, 1938, the examination was negative.

Q. Did you make any diagnosis on that consultation, or after your examination on May 21, 1938?

A. We just recorded that the findings were negative. I did not find anything wrong with his eyes.

Q. May I see the prescriptions? May I show the witness Plaintiff's Exhibits 5 and 6. I now show you, Doctor, two prescriptions, bearing designations Plaintiff's Exhibits 5 and 6, and will ask you whether or not you have previously seen those prescriptions? A. I did.

[43]

Q. Those prescriptions were given and written by you, were they? A. They were.

Q. Referring to Plaintiff's Exhibit No. 5, I note that there is written thereon: Tablets of pheno barbital, is that correct? A. Correct.

Q. What is the purpose of that medicine? What function does it serve?

A. To quiet the apprehension of the patient.

Q. On each of your examinations of Mr. Lutz, to which you have testified, did you take his blood pressure?

A. I did not.

A. I will ask you to tell us what the prescription is, what medicine was prescribed by the prescription, which is Plaintiff's Exhibit No. 6, which I now hand you.

A. Saturate solution of potassium iodine, one ounce; signa, 10 drops twice a day after meals in half a glass of milk.

(Testimony of Stephen G. Seech)

Q. What was the purpose of that medicine?

A. The purpose of that medicine is to hasten the absorption of blood.

Mr. Herndon: That is all, your Honor, with this witness.

Cross-Examination

Q. By Mr. McGinley: Dr. Seech, do I summarize your findings on October 11, 1937, to be that the condition of Abe [44] Lutz that you treated had completely cured up on that day? A. It did.

Q. I understand he came back to see you on a date subsequent to October 11, 1937? A. He did.

Q. And on May 21, 1938, do I understand that the condition for which he came to you, and which you had treated, had been cured up so that his vision was 20 over 20, being normal? A. Right.

Q. And when he was discharged as a patient of yours, during the month of May, 1938, you found nothing short of normal in the condition for which you had treated him?

A. Right.

Mr. McGinley: That is all.

Q. By Mr. Herndon: Doctor, do I understand that your examinations and treatments were related exclusively to the eyes? A. Correct.

Mr. Herndon: That is all. [45]

* * * * *

PRESTON B. BROWN,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Preston B. Brown.

Direct Examination

Q. By Mr. Herndon: Where do you reside?

A. 885 South Lucerne Boulevard.

Q. What is your business or occupation?

A. District claim representative, Equitable Life Assurance Society of New York.

Q. Do you maintain your office in Los Angeles?

A. 607 South Hill.

Q. How long have you been so engaged?

A. I have been with the company 24 years. On the claims end of the business for about 20.

Q. Now, I show you a letter, a photostatic copy of a letter on the letterhead of Equitable Life Assurance Society of the United States, bearing date June 23, 1944, bearing a signature purporting to be that of Preston B. Brown, this photostatic copy of letter being a part of Exhibit 1 for identification to the deposition of Freeman P. Spinney, and I will ask you whether or not you have previously seen the original of said letter?

A. I have.

Q. Did you write that letter? [46]

A. I wrote the letter.

Q. Did you send it to the addressee? A. Yes.

Q. I will now ask you to examine an instrument reading as follows: "This will authorize you to furnish the bearer who represents The Equitable Life Assurance Society of the United States with any and all information you may have concerning the medical history, illness and

(Testimony of Preston B. Brown)

treatments of Abe Lutz, deceased", purporting to bear the signature of Harry Lutz, 1012 South Highland Ave., Los Angeles, Calif., relationship, son, dated June 7, 1944, this instrument being a part of Exhibit 1 for identification, attached to the deposition of Freeman P. Spinney, and I will ask you whether or not you have previously seen the original of the document appearing to be identical with the instrument I now show you? A. I have.

Q. Will you state whether or not you sent the original of such instrument with your letter of June 23, 1944, to which you have been referred?

A. Yes, enclosed with this letter.

Q. I will now show you photostatic copy of a letter dated June 26, 1944, addressed to you, purporting to bear the signature of H. M. Benning, M.D., and I will ask you whether or not you received the original of that letter?

A. I did, and the original was subsequently transmitted [47] to our home office.

Q. Do you know where the original letter now is?

A. I assume it is at the home office.

Q. Where is your home office?

A. 393 Seventh Avenue, New York City.

Q. Did you read the original of the letter from Dr. Benning, dated June 26, 1944?

A. Do you mean when I received it?

Q. Yes. A. Surely.

Mr. Herndon: You may cross examine.

Mr. McGinley: May I inquire, your Honor, if counsel is offering the correspondence that the witness identified?

Mr. Herndon: We intend to offer it, your Honor, and I presume I may do so at this time, and we do now offer in evidence as one exhibit, the letter dated June 23, 1944,

addressed to the Sansum Clinic, Santa Barbara, California, signed by Preston B. Brown, the authorization dated June 7, 1944, signed by Harry Lutz, which the witness has testified was transmitted with the letter of June 23, 1944, and the letter from Dr. Benning addressed to Mr. Preston B. Brown, dated June 26, 1944, all three of which instruments are a part of Plaintiff's Exhibit No. 1 for identification, attached to the deposition of Freeman P. Spinney, and Dr. H. M. Benning.

The Court: May I see the document, please? [48]

Mr. Herndon: May I state, your Honor, that these exhibits consisting of these three instruments, and all of the testimony of this witness, has been offered and introduced for the sole and exclusive purpose of proving waiver of the privilege, and proving that the defendant and counter-claimant Harry Lutz is estopped now from asserting privilege, and for no other purpose.

Mr. McGinley: Having in mind that the evidence is offered for that sole purpose, to-wit, the question of proving that the privilege has been waived, the defendant objects to the documents on the following grounds:

First: As of the authorization dated June 7, 1944, on the ground that the authorization is limited to the Equitable Life Assurance Society, in connection with the claim upon a policy of insurance in which the defendant, Harry Lutz, is beneficiary, and was furnished to the Equitable Life Assurance Society in connection with negotiations conducted subsequent to the death of Abe Lutz, and is, therefore, limited, and not general.

2. On the ground that the authorization was given at a time subsequent to the decease of the patient, Abe Lutz, and does not come within the exceptions of Sec. 1881, sub 4, California Code of Civil Procedure, and is, therefore, not competent to establish the matter of waiver of privilege; and,

3. On the ground that as to the parties to this [49] litigation, the correspondence between the beneficiary, Harry Lutz, and the Equitable Life Assurance Society, would be hearsay on the question of waiver or privilege as affects the deceased, Abe Lutz.

Now, if your Honor please, the letter of January 23, 1943, from Preston B. Brown, to the Sansum Clinic, is objected to upon the following grounds: First, it is immaterial to any issues in this case, in that it purports to refer to a claim of the beneficiary against another insurance company, the Equitable Life Assurance Society;

2. It is hearsay, as far as the present litigation is concerned.

The letter of June 26, 1944, is objected to on the following grounds: That there has been no foundation laid in that the purported signature of H. M. Benning, M.D., is not proven—may I withdraw that ground, your Honor, because I think there is no question about this being Benning's letter, and restate the last ground? I noticed it is signed by typewriter, but I will withdraw that ground of objection.

The letter dated June 26, 1944, purporting to be from H. M. Benning, M.D., to Preston B. Brown, is objected to upon the following grounds: First, there has been no foundation laid that the matter of privilege under Sec. 1881, sub 4, has been waived.

2. That the matter called for by said communication [50] constitutes privileged matter under Sec. 1881, sub 4;

3. That it affirmatively appears that the information disclosed in the letter constitutes declarations and treatment prescribed by H. M. Benning, M.D., a licensed physician, at a time when said physician was treating the deceased, Abe Lutz; and

The last ground, that the letter discloses alleged statements of the deceased subsequent to the date when he applied for the insurance with plaintiff's company in this action, and such statements, in so far as the beneficiary, Harry Lutz, is concerned, are not part of the *res gestae*, constitute hearsay, and are not binding upon Harry Lutz.

The Court: Your basic objection, as I understand it, is that the California Code, which is applicable, and particularly Section 1881, entitled: Confidential communications; subdivision 4, entitled: Physician and patient, indicates that information acquired by a licensed physician in attending a patient, which information was necessary to enable him to prescribe or act for the patient, is a confidential communication, and that the only person who can waive it is the patient himself, unless the waiver is governed by exceptions 1, 2, 3 or 4 immediately following, and that none of those sections are applicable in this case for the reason that it is not a contest of a will under 1;

that it is not an action or proceeding brought to recover damages on account of the death of the patient under 2; [51] that it is not an action to recover damages for personal injuries under 3; and that it is not an action by the executor or administrator of the estate, or the surviving spouse, or by the children, to recover for the death of the patient, and that therefore, the ability to consent being by the express terms of the statute limited to the patient the son has no right to make a waiver? Is that the point?

Mr. McGinley: Yes, your Honor. You ask if that is my basic objection. That is my basic objection, but the other one, I think, is of equal dignity and merit, and that is that when the waiver is given by a beneficiary on a policy, to an insurance company, when there is no indication that the policy will not be paid, that, under the statutes, constitutes a waiver much broader than either of the waivers here. Courts hold that that is a limited waiver, instead of a general waiver, and that is a waiver which is referred to in this last offer of documents. But your Honor has stated my position with reference to the section, and I have quoted the California cases in my pre-trial memorandum, which goes so far as to hold that when a patient has died that our courts are so jealous of protecting the privilege in favor of the patient that unless they come within the express terms of the section they do not have power to waive the privilege on behalf of the deceased, so much so that at one time in the State of our progressive legislation, that the administrator could not waive it on [52] behalf of the deceased; then the legislature came along and amended that section, expressly including the administrator.

(Discussion.)

(Testimony of Preston B. Brown)

The Court: We don't want to keep this gentleman waiting here all day while we discuss this. Let us go ahead and take this testimony, subject to a motion to strike, and then we will see what happens.

Cross-Examination

Q. By Mr. McGinley: Mr. Brown, was the communication of June 23, 1944, the first communication that you had written relative to the claim of Harry Lutz, on a policy issued by the Equitable Life Assurance Society on the life of *your* father?

A. Is that the letter to the Sansum Clinic?

Q. Mr. Brown, I am handing you the deposition to which counsel has referred, and I direct your attention to a letter dated June 23, 1944, on the stationery of the Equitable Life Assurance Company, signed by yourself. My question is, was that the first communication that you wrote in regard to this matter?

The Court: To the Sansum Clinic?

Mr. McGinley: Yes.

A. Oh, yes, that's the first and only letter, that I recall.

Q. Your purpose in corresponding with the Sansum Clinic was relative to an investigation to be made by you [53] after the death of Abe Lutz?

A. That is correct, sir.

Q. And the forwarding of the authorization dated June 7, 1944, was to enable you to obtain information from the Sansum Clinic relative to the investigation you were making?

A. That's right.

(Testimony of Preston B. Brown)

Q. The reply that you received from the Sansum Clinic, dated June 26, 1944, was that information forwarded to the Equitable Life Assurance Society as part of your investigation on the claim of Harry Lutz, following the decease of his father? A. It was.

Q. Do you have any records with you to state when your investigation was concluded and the results of the action of the Equitable Life Insurance Company?

A. No.

Mr. Herndon: That is objected to, if your Honor pleases, upon the ground that it is purely immaterial, outside and beyond the scope of the direct examination.

The Court: As I understand, the answer was no, so it is immaterial. A. That is correct, sir.

Mr. Herndon: I did not hear the answer.

Mr. McGinley: That is all. [54]

* * * * *

Mr. Herndon: If your Honor please, I wish at this time to read in evidence the deposition of Dr. Harold M. Frost. I don't know whether it would be better to have the objections ruled on as the questions are read, or not.

The Court: I imagine so. You have reserved the objections, haven't you? Where was this taken?

Mr. Herndon: It was taken in Boston on written interrogatories, direct interrogatories prepared by us, and cross interrogatories.

The Court: Suppose you read the question, the objection, and then the answer, in that form.

(Testimony of Preston B. Brown)

Mr. Herndon: Very well, your Honor. I wonder if it would be satisfactory if Mr. Anderson would read the deposition? My voice has about failed me.

The Court: Yes. [75]

Mr. McGinley: May I say this, your Honor, in regard to the deposition: The deposition which is about to be read, was taken pursuant to written stipulation, which reserved to the defendants all of the objections which could be made to the testimony of Mr. Frost, if he were personally in court, and called as a witness to testify. Additionally, in order that counsel might overcome the objection as to the form of the question, the stipulation specifically provided the specific objections which were objected to on the ground of form; it was sort of an unorthodox procedure, but we were willing to do so, as I wanted to accommodate counsel so that there would be no interruption or delay in getting the deposition out.

The Court: Read the question and the objection, and I will rule on it.

[Note: Deposition of Harold M. Frost deleted at this point pursuant to stipulation on file herein.]

* * * * *

HARRY LUTZ,

the defendant, called for cross examination, having been first duly sworn, testified as follows:

Cross-Examination

Q. By Mr. Herndon: Your name is Harry Lutz?

A. Yes.

Q. You are one of the defendants in this action?

A. Yes.

Q. And counterclaimant? A. Yes.

Q. What is your relationship to Abe Lutz, deceased?

A. A son.

Q. At this time, Mr. Lutz, I hand you Plaintiff's Exhibit No. 2 in evidence, being the application for the policy of insurance involved in this action, and will ask you whether you signed that application?

A. I did.

Q. Did you pay the first premium on the policy?

A. I did.

Q. Was that premium at the time of the signing of this application? A. Thereabouts.

Q. Either at that time or a few days later?

A. Yes, sir.

Q. And did you pay the second premium on the policy? A. Yes. [97]

Q. Do you recall approximately when you paid the second premium? A. For December, 1944, I guess.

Q. As a matter of fact, Mr. Lutz, you paid the first premium at the time the policy was delivered, did you not?

A. Thereabouts. I don't know if it was a day either way.

Q. By whom was the policy delivered to you?

A. I don't remember.

(Testimony of Harry Lutz)

Q. You don't remember from whom you received the policy? A. No, I don't.

Q. When do you first recall having had the policy in your possession?

A. I couldn't tell. Maybe a day or two after I paid the premium.

Q. Is it your recollection now that you paid the premium at about the time the policy was delivered?

A. Yes.

Q. But you don't remember to whom you paid the premium? A. I think it was Stanley Leeds.

Q. After the policy was delivered to you, what did you do with it?

A. I think my father put it in his safety deposit box.

Q. Did you give it to your father?

A. Yes, I handed it to him. [98]

Q. Did you subsequently see it in the safety deposit box? A. No.

Q. Did your father tell you that he had placed it in the safety deposit box? A. Yes.

Q. Who had access to that particular box?

A. My father and myself.

Q. Anyone else? A. No.

Q. Both you and your father had access to the safety deposit box in which you say this policy was placed, from December 1, 1942 until the date of your father's death, did you not? A. Yes.

Q. Are you the owner of the policy of life insurance that is involved in this case? A. Yes.

Q. You paid all of the premiums that were paid on it out of your own personal funds? A. Yes.

Q. Did you live with your father in your father's home during the year 1942? A. No.

(Testimony of Harry Lutz)

Q. Were you associated in business with your father during the year 1942? [99] A. Yes.

Q. And saw him almost daily during the year 1942?

A. Yes.

Q. Were you with him in the same office?

A. Yes.

Q. Do you know Dr. Maurice H. Rosenfeld?

A. I don't know him. The first time I met him was the night that my father passed away.

Q. At the date when you signed the application for the policy involved in this case did you know that your father had previously consulted Dr. Rosenfeld?

A. No.

Q. Do you know Dr. Stephen Seech? A. No.

Q. You don't know the doctor? A. No, sir.

Q. At the time that you signed the application, Plaintiff's Exhibit 2, which I have shown you just a moment ago, did you know your father had consulted Dr. Seech?

A. No.

Q. At the time you signed the application for the policy involved in this action had your father told you that he had consulted either Dr. Rosenfeld or Dr. Seech?

A. I don't remember whether he did tell me about Rosenfeld, but I am positive he never told me about Seech.

Q. Do you know Dr. Fred Polesky? [100]

A. Yes.

Q. Did you know, at the time you signed the application for the policy involved in this case, that your father had consulted Dr. Polesky? A. About the policy?

Q. No. A. How many years are you taking in?

(Testimony of Harry Lutz)

Q. I am asking you whether you knew, at the time you signed the application that your father had previously consulted Dr. Polesky?

A. Well, I don't quite understand your question. Previous—how long did that take in?

The Court: At the time that you signed the application did you know that at any time prior to that date your father consulted Dr. Polesky as a physician?

A. How many years back?

The Court: Any number. A. Oh, yes, yes.

Q. By Mr. Herndon: When was it that your father had seen Dr. Polesky?

A. I would say around 1935.

Q. Did you say, Mr. Lutz, that you did not know, at the time you signed the application, that your father had been treated by Dr. Rosenfeld?

A. No, he had been treated by Dr. Rosenfeld, as far as I know, about gas pains. [101]

Q. Then you did know at the time you signed the application that your father had consulted Dr. Rosenfeld about gas pains? A. Yes.

Q. At the time you signed the application for the policy involved in this case did you know that your father had consulted Dr. Rosenfeld on more than one occasion prior to that? A. No.

Mr. McGinley: If your Honor please, may the answer go out for the purpose of objection?

The Court: The answer was no.

Q. By Mr. Herndon: You say that prior to the date when you signed the application for the policy in suit your father had suffered gas pains? A. Yes.

Q. And prior to the date of the application, that is, prior to November 14, 1942, your father had told you,

(Testimony of Harry Lutz)

had he not, on several occasions that he was suffering from gas pains?

A. Not several. He told me he was suffering from gas pains.

Q. On how many different occasions would you say, approximately, your father had told you he was suffering from gas pains, that is, prior to November 14, 1942?

A. One or two.

Q. On each of those occasions did your father refer to [102] his pains as being indigestion? A. No.

Q. Isn't it a fact that on several occasions during the year 1942, and prior to November 14, 1942, your father told you that he had consulted Dr. Rosenfeld?

A. No.

Q. At the time you signed the application for the policy in suit, did you know that your father was taking medicine?

A. Well, I knew he had a bottle with him, but I did not know what it contained.

Q. Did you ever see your father take anything out of that bottle and put it in his mouth? A. Yes.

Q. What were they, tablets?

A. They were little pills. I wouldn't know what they were. I don't know what they contained.

Q. Did you ever discuss with your father what those tablets were?

A. Yes, he said he took them just to relieve his gas pains.

Q. How many times would you say that your father told you that, in substance, prior to November 14, 1942?

A. Question, please?

Q. Will the reporter read the question?

(Question read by the reporter.) [103]

(Testimony of Harry Lutz)

A. I don't get the question.

Q. By the Court: How many times did your father tell you that he was taking this medicine for gas pains, prior to the time you signed the application?

A. That was never discussed.

Q. By Mr. Herndon: You said a moment ago that on one occasion at least he told you that he was taking the pills for gas pains? A. That's right.

Q. Did he tell you that on more than one occasion prior to November 14, 1942?

A. Well, after I seen him take them I knew what he was taking them for. He did not have to tell me again.

Q. How many times prior to November 14, 1942 would you say you observed your father taking these pills? A. Several times.

Q. Did your father ever tell you, prior to November 14, 1942, that Dr. Rosenfeld advised him to cut down on his activities and restrict his activities? A. No.

Q. Prior to November 14, 1942 did your father ever discuss with you what Dr. Rosenfeld had told him?

A. No.

Mr. Herndon: No further questions at this time, your Honor.

Q. By Mr. McGinley: Mr. Lutz, you signed the application. [104] which is part 1 of the application, on November 14, 1942, is that right?

A. About that time.

Q. And it was subsequent to that, and on November 16, 1942, that your father appeared before Dr. Waste, to be examined for insurance?

Mr. Herndon: May I have the question read?

(Question read by the reporter.)

(Testimony of Harry Lutz)

Mr. Herndon: I object to that, if your Honor please, upon the ground that no foundation has been laid, and that it is leading and suggestive.

The Court: Objection sustained.

Mr. McGinley: No further questions, your Honor.

Mr. Herndon: If your Honor please, in view of the additional matters of foundation which have been received in evidence subsequent to the time that plaintiff previously offered the notes of Dr. Rosenfeld, which I believe are identified now as Defendants' Exhibit A, we would again at this time offer those notes in evidence, particularly by reason of the fact that a portion of the notes were read into the record in response to questions propounded by counsel for the defendant.

Mr. McGinley: The defendants object to the notes, being the memorandum referred to by the witness, Dr. Rosenfeld, on direct examination, as well as on cross examination, on the ground that they were used to refresh [105] his memory, and are incompetent to establish the truth of any recitals contained in the memorandum.

The Court: It is my understanding that there is nothing contained in the notes that has not already been testified to. If so, it just clutters up the record to put them in. The offer will be declined.

Mr. Herndon: I think it has been stipulated, or at least understood, your Honor, that in all of the depositions in which photostatic copies have been used, it may be deemed that they have the same force and effect as though they were originals.

Mr. McGinley: The defendant so stipulates, your Honor.

Mr. Herndon: The plaintiff rests. [106]

* * * * *

HARRY LUTZ,

recalled as a witness by and on behalf of the defendants, having been heretofore duly sworn, testified as follows:

Direct Examination

By Mr. McGinley:

Q. Mr. Lutz, you have previously testified and been sworn, have you? A. Yes.

Q. How long had you been associated with your father in business, up until his death, Mr. Lutz?

A. About 15 years.

Q. That is, in the City of Los Angeles?

A. Yes.

Q. What was the nature of your father's business?

A. Structural steel and jobbing of steel.

Q. Originally what was your father's business?

A. Junk business.

Q. Where was your father born? A. Russia.

Q. Do you know how old he was when he came to this country? A. About 13 years old, I think.

Q. To your knowledge, did your father attend any schools? A. No.

Mr. Herndon: That is objected to, if your Honor please, on the ground that it is immaterial and hearsay. [169]

The Court: Objection sustained.

Q. By Mr. McGinley: Will you describe what your duties were in connection with your father's business?

A. Salesman, purchasing, general shop work, and a little office work.

Q. Will you describe your practice, as between you and your father, in answering the correspondence relative to business matters?

(Testimony of Harry Lutz)

Mr. Herndon: That is objected to by plaintiff, if your Honor please, upon the ground it is wholly immaterial to any matter in issue in this case.

Mr. McGinley: As part of our defense, your Honor, we have alleged that the deceased, with the exception of popular words, and a few instances, such as his name, was unable to read and write the English language, and this proof is primarily to show that in conducting the business of the deceased that letters received in English and answers which were forthcoming to those letters in English were attended to by the son and those who were associated with the father.

Mr. Herndon: In view of the statement of counsel of his purpose, we add the further objection that the question is wholly immaterial; that the question of whether or not the insured could read or write is immaterial, in that under the law the contracting party presumptively knows what the contract is, and in the absence of reformation of the contract, the contract cannot be so challenged or repudiated, even if [170] the foundation for reformation were laid, by proper pleading, still it would not be competent so to do on any grounds of unilateral mistake. There is no allegation that any fraud or imposition was practiced upon either the insured or the defendant and counter-claimant by plaintiff, so under no theory, if your Honor please, would the question before the Court be material, nor would the question of whether the insured could read or write be material to any issue in this case.

Mr. McGinley: If your Honor please, in the last case cited in the pre-trial memorandum, a late decision, our Supreme Court has said that in viewing insurance contracts, where they are prepared by highly specialized

(Testimony of Harry Lutz)

experts, where their manner of handling is a little bit out of the ordinary, of ordinary contracts, that the courts do not view a policy of insurance in the same manner as they do the ordinary contract, when an issue is raised as to its meaning, and in that light this evidence is directed to the fact, in addition to the ground of illiteracy, in the respects which I have mentioned, that at the time the medical examiner for the insurance company made the examination, there was no mention made to the decedent that in addition to signing an application for insurance he was also waiving the benefits of privileged communication.

(Discussion.)

The Court: Regardless of the weight to be given the [171] testimony, and whether or not the testimony would accomplish the purpose, our courts of law have their hands entirely tied on a matter of that kind, because the man in question has died. You had better think that over between now and 2:00 o'clock. [172]

* * * * *

HARRY LUTZ,

resumes the stand for further

Direct Examination

By Mr. McGinley:

Mr. McGinley: If your Honor please, may I withdraw the last question which was asked just before adjournment, for a few more foundational questions?

The Court: Very well.

(Testimony of Harry Lutz)

Q. By Mr. McGinley: I believe you testified, Mr. Lutz, that about 15 years ago you went to work for your father in his business? A. Yes.

Q. And you worked continuously from that time up until what day?

A. September; I think about the 20th, when I went into the Navy.

Q. September 20th of what year? A. '43.

Q. You were in the Navy from September, 1943, until what date?

A. Approximately the 20th of September, 1944.

Q. Of 1944? A. Yes. [173]

Q. During the period commencing with the date of your first working for your father in his business, and up until you went into the service, how frequently did you see your father at your father's place of business?

A. About every day, except if he would go on a vacation, something like that.

Q. What portion of the working day during that period of time would you spend at your father's place of business? A. From eight to ten hours a day.

Q. And during that period of time you were in the same office as your father? A. Yes.

Q. Will you state to the Court what you observed, insofar as your father was concerned, with reference to answering correspondence relative to your father's business?

Mr. Herndon: The plaintiff objects to the question upon the ground that it is wholly immaterial what his father's practice was with respect to the subject under inquiry.

(Testimony of Harry Lutz)

The Court: Well, it may be, but I think under the Federal rules, there being no jury, that I shall receive it subject to a motion to strike.

A. Well, we were in the steel business in the later years, and buying and selling plants, and every time anything would come up as to any contracts, or any reading, we would have to, myself or my brother-in-law, one of us, would have to read this contract or contracts to my father, or any [174] detail that had a certain thing to do with reading or writing on contracts.

Mr. Herndon: The plaintiff moves to strike the answer.

The Court: Don't bother to do that with every question. Otherwise we would never get through. Go ahead.

Q. By Mr. McGinley: Who is the brother-in-law to whom you refer? A. Ed Friedman.

Q. Will you state what you observed during the period of time which you have mentioned being with your father in his business, of the acts of your father with reference to answering correspondence received by him?

Mr. Herndon: I presume, your Honor, it is understood this is all subject to the same objection?

The Court: Let it be stipulated that all these questions regarding his illiteracy of the English language, are objected to for the reasons indicated, and they are received subject to a motion to strike.

Mr. McGinley: So stipulated.

The Court: You may answer.

A. We had to read and write everything for my father, my brother-in-law and myself.

(Testimony of Harry Lutz)

Q. By Mr. McGinley: When you use the expression "we", to whom do you refer?

A. My brother-in-law and myself.

Q. When you received the policy in suit, I mean the [175] physical possession of it, did you believe the policy of insurance valid and enforceable? A. Yes.

Mr. Herndon: If your Honor please, I object to that question upon the ground that it is immaterial.

The Court: Objection sustained.

Q. By Mr. McGinley: Prior to the delivery to you of the policy in suit, did you have a conversation with Mr. Stanley Leeds relative to the issuance of the policy?

A. Yes.

Q. Where did the conversation take place?

A. I think it was in our office, 2500 Santa Fe Avenue.

Q. What was the approximate date?

A. Well, I think it was about a month before the policy was issued.

Q. Was anyone present besides yourself and Mr. Leeds? A. And my father.

Q. Without giving the details of the conversation yet, was the purpose of procuring the policy discussed?

A. Yes.

Q. Will you state the conversation, stating what you said, and what Mr. Leeds said? [176]

Mr. Herndon: That is objected to by plaintiff, if your Honor please, upon the ground that it is wholly immaterial; that it is hearsay so far as this plaintiff is concerned, and not in any way binding on the plaintiff, and that no proper foundation has been laid indicating or tending to indicate that it could be binding on the plaintiff.

(Testimony of Harry Lutz)

Mr. McGinley: If your Honor please, one of the allegations of the defense of estoppel is that the plaintiff insurance company knew that the policy in suit was being issued to take care of an estate tax program, and it is further alleged that in reliance on that situation, which was communicated to the plaintiff company, this beneficiary received a paid-up policy, which was then outstanding on the life of his father, the net result being that had not this policy been issued he would not have accepted the disadvantage of receiving a paid-up policy. In Mr. Morgan's deposition, referring to the letter of December 8, 1942, the first paragraph discloses knowledge of the fact that the beneficiary had a tax problem, it reading as follows:

"As far as insurance interest is concerned, you will notice that Mr. Lutz, the proposed insured, now owns a considerable line of life insurance, and has an estate tax problem."

I developed this morning, in the examination of Mr. Morgan, that before he wrote the letter of December 8, 1942, he had discussed the matter of the issuance of this policy [177] in suit with Mr. Leeds. Now, Mr. Leeds who was the party to this conversation, is noted on Part 1 of the application attached to the policy in suit, as the soliciting agent for the plaintiff insurance company. While that is stepping from one stone to another, it probably is the only way that I can show knowledge, first from the soliciting agent, then the special general agent, Mr. Morgan, and if I am correct in my position this morning, that after the deposition was read, that would be notice confirmed by the letter to Mr. Morgan.

(Testimony of Harry Lutz)

The Court: What difference does it make what the insurance was secured for?

Mr. McGinley: This difference; I submit, under the defense of estoppel it is necessary to show a change or prejudice in position. Under the defense of waiver it is not. Under the defense of estoppel, if this insurance company knew that this policy was issued to take care of a tax problem, and the beneficiary, in reliance on the issuance of the policy, changed its position, that is an essential fact which constitutes one of the elements of estoppel.

The Court: I think we are going around Robin Hood's barn; yet it may be possible you can connect it up. With that understanding, subject to a motion to strike, I will permit it.

Mr. McGinley: May I have the reporter read the question, [178] if your Honor please?

Mr. Herndon: May I inquire, your Honor, as to the time? I am not clear as to the time of this conversation.

The Court: I thought he had fixed it. When was this conversation?

A. About a month or two before the policy issued. Mr. Leeds came into the office and set up our tax problem with our auditor, and at that time I was carrying a \$38,000 policy on my father, and we just got a policy from the Equitable,—two \$5,000 policies—

The Court: Just tell what was said in words; not what was in your mind. What was said in this conversation?

A. And he said that I should take a paid-up policy on this \$38,000 policy, of \$15,000, and cancel our bal-

(Testimony of Harry Lutz)

ance of the policy, and take a new policy out of \$13,000 with an insurance company.

Q. By Mr. McGinley: Have you give us, as nearly as you can recall at this time, all of the conversation with Mr. Leeds? A. I think so.

Q. Subsequent to your receiving the insurance policy from the New England Mutual Life, state whether you cancelled and received a paid-up policy on the \$38,000 policy that you mentioned?

Mr. Herndon: Plaintiffs objects on the same grounds.

The Court: The objection is sustained. [179]

Mr. McGinley: May I inquire then of your Honor if I should state an offer of proof of what I intend to show?

The Court: There has got to be some limit to every lawsuit. You can't chase all around Robin Hood's barn. After all, when a man cancels a policy there is supposed to be some sound reason for it, and the fact that he did is not the important matter, because, as a matter of fact, if he relied upon the representations at the time, all right; what difference does it make what happened? What difference does it make what happened last week, or that he happened to have dinner with John Doe's wife's sister's husband's aunt? Are we going to go into that too?

Mr. McGinley: No, your Honor, I had not intended to be that remote. I want to show that on reliance of the validity of this policy he cancelled and accepted a paid-up policy on the \$38,000 policy, thereby changing his position.

May the record show that through this witness I offer to prove that subsequent to the receipt of the policy in suit this witness cancelled a \$38,000 policy under which he was

(Testimony of Harry Lutz)

the beneficiary, and received a paid-up policy in the sum of \$15,000?

The Court: May it be stipulated that if this witness were asked that question he would so answer?

Mr. Herndon: Yes, your Honor.

The Court: So stipulated. That takes care of that.

Mr. McGinley: That is all. [180]

Cross-Examination

Q. By Mr. Herndon: Mr. Lutz, referring to the conversation to which you testified a moment ago, with Mr. Leeds, in the office of the Western Iron and Metal Company, at which you say your father was present, that was prior to the filing of the application, wasn't it?

A. Yes.

Q. Do you recall the occasion of the taking of your deposition in the office of your counsel on March 2, of this year? A. Yes.

Mr. Herndon: May I state to counsel for defendants that I propose to show the witness his deposition, and ask him to read particularly page 5, line 1, to page 6, line 26. May I show it to the witness, your Honor?

The Court: Yes.

Q. By Mr. Herndon: Mr. Lutz, I will ask you to read page 5, line 1, to page 6, line 26.

A. —how long have you known Mr. Leeds—

Q. No, just read it to yourself. A. Yes.

Q. Have you read all of the portion that I indicated to you? A. No.

Q. Read also all of page 6. Now, if your Honor please, for the purpose of impeachment, and by virtue of the [181] provisions of Rule 26(f), Rules of Federal

(Testimony of Harry Lutz)

Procedure, I should like to read from the deposition of the defendant and counterclaimant, Harry Lutz, given on March 2, 1945, reading from page 5, line 1, to page 6, line 26, as follows, and I will ask the witness whether the following questions were asked, and the following answers given by him:

"Q.—How long have you known Mr. Leeds?

"A.—About four years.

"Q.—Has he been your agent to place other insurance?

"A.—Yes, sir.

"Q.—And who talked to Mr. Leeds about this application, if you know?

"A.—Well, he usually dopes up something, and he usually brings out a policy without you even asking him to.

"Q.—Well, do you know what the procedure was in this case?

"A.—Well, he wanted me to have a policy; my father wanted me to have a policy on my father's life for my own income.

"Q.—And what did you or your father do about it, so far as getting the insurance is concerned?

"A.—We must have went ahead and done it, because this is the policy.

"Q.—Well, did you talk to Mr. Leeds about it?

"A.—I talked over afterwards, I guess I talked to him before, to dope up something so I would have some income. [182]

"Q.—Do you recall the conversation?

"A.—Only that we both talked together, and he said well that I should be independent of the business, and should have some life insurance on my father.

(Testimony of Harry Lutz)

"Q.—What did you say to him in response to that?

"A.—I told him I thought it was a very good idea.

"Q.—Was there any discussion of estate tax in your conversation?

"A.—No.

"Q.—And did you say anything to Mr. Leeds as to whether or not you wanted him to go ahead and get the policy for you?

"A.—I must have. He went ahead and got the policy.

"Q.—Well, do you recall whether or not you did?

"A.—Well, I will say yes.

"Q.—You don't recall what you said to him?

"A.—No, I don't; not word for word, no.

"Q.—Well, just the substance of it.

"A.—Well, I said that it was a good idea, and to go ahead and make up the policy.

"Q.—When did you next see the application after Mr. Leeds took it, after you had signed it?

"A.—I don't think I seen the application; I just saw the policy.

"Q.—When did you see the policy?

"A.—Well, after he brought it down, when I gave him the check for the premium. [183]

"Q.—Do you recall that date of that?

"A.—No, I don't.

"Q.—And did you look at the policy at that time?

"A.—No, I don't believe I did.

"Q.—What did you do with the policy?

"A.—Put it in a safe deposit box."

Do you remember those questions being asked you?

A. I do.

(Testimony of Harry Lutz)

Q. And were those answers given by you?

A. Yes.

Q. Mr. Lutz, your father was the owner of the Western Iron and Steel Company? A. Yes.

Q. That business consists of the processing and manufacturing of steel products? A. Fabrication.

Q. Your father for many years was the sole owner of that business? A. Yes.

Q. Is it not a fact that during the calendar year of 1942 the business of which your father was the owner made net sales of steel products of approximately \$400,000? A. Somewheres about.

Q. You are the executor of your father's estate?

A. Yes.

Q. Your father left an estate appraised in excess of [184] \$100,000, did he not? A. I think so.

Q. During the year 1942 the profits from the business owned by your father were in the neighborhood of \$200,000, were they not? A. No.

Q. What were they? A. Around \$100,000.

Q. Your father was in active participation in the conduct of the business? A. Yes.

Q. What duties did your father perform in connection with the conduct of the business, during the year 1942? A. Manager.

Q. And as manager, what were his duties? What did he do?

A. To see that everything run smooth. He purchased, went out on deals to buy, to sell.

Q. Mr. Leeds had been your agent for the procurement of other insurance, had he? A. Myself?

Q. Yes. A. Yes.

(Testimony of Harry Lutz)

Q. With respect to life insurance matters you consulted Mr. Leeds and followed his advice generally in the procuring of insurance? [185] A. Yes.

Mr. McGinley: If your Honor please, may I ask that the answer go out for the purpose of objecting?

The Court: Yes.

Mr. McGinley: That is objected to on the ground that by plaintiff's own contract Stanley Leeds was soliciting agent of the insurance company, as shown on Part 1 of the policy in suit.

The Court: That is one of the things I was trying to avoid. I think two wrongs don't make a right. I think I will let him answer. The answer may stand.

Mr. Herndon: No further questions.

The Court: Both of you understood that what I was trying to do was to save time; that when I said if he were asked that question he would so testify, that I meant that was going in as evidence, subject to a motion to strike, so the question is presumed to be answered just as he indicated, that he did cancel that policy, and received the benefits from it.

Mr. McGinley: I so understood. May I have one or two questions?

The Court: Surely.

Re-Direct Examination

Q. By Mr. McGinley: Mr. Lutz, counsel has read from your deposition, pages 5 and 6, relative to the conversation between yourself and Mr. Leeds. I want to ask you if you [186] had more than one conversation with Mr. Leeds regarding the issuance of the policy in suit? A. Yes.

(Testimony of Harry Lutz)

Q. And the conversation that you testified to on direct examination, I believe you said your father was present when he mentioned the estate tax problem? A. Yes.

Q. And you had conversations with Mr. Leeds regarding the policy in suit, when your father was not present? A. Yes.

Mr. McGinley: That is all.

Recross-Examination

Q. By Mr. Herndon: Mr. Lutz, was the conversation with Mr. Leeds, at which your father was present, and concerning which you testified on direct examination, prior or subsequent to the conversation concerning which you testified in your deposition? A. I don't know.

The Court: You don't know? I do not understand the answer.

A. I don't know whether it was before or after.

Q. You remember there were two conversations, one at which your father was present, and one at which he was not present? A. Yes, sir.

Q. By Mr. Herndon: Where was the conversation had with [187] Mr. Leeds concerning what you testified in your deposition?

A. We were neighbors; we were next door to each other, practically, and seen each other practically every day.

Q. That does not answer my question.

A. I am sorry.

Q. Where was the conversation had concerning which you testified in your deposition?

A. I don't remember that.

Q. But you do remember that such conversation was had? A. Yes.

(Testimony of Harry Lutz)

Q. And it was at the conversation testified to in your deposition that you finally told Mr. Leeds to go ahead and get the policy for you? A. Yes.

Q. Then it is a fact that this conversation concerning which you testified in your deposition was the last one that you had with Mr. Leeds prior to the time you signed the deposition, is that true?

A. No, I said I don't remember whether it was prior—before or after.

Mr. Herndon: That is all. [188]

* * * * *

Mr. McGinley: If your Honor please, might I inquire as to your Honor's desires and suggestion as to the manner in which we should handle the motions to strike?

The Court: You can wait until the end of the testimony, until we get this transcript. You don't need to make it now. You may make it at any time up to the end of your case.

Mr. McGinley: If your Honor please, the plaintiff having rested, come now the defendants and counter-claimant and move the court for an order of dismissal, or judgment of dismissal, of plaintiff's complaint, on the following grounds:

First, that no facts have been proved which would entitle plaintiff to a judgment for the relief sought in [106] the complaint;

2. That the only competent testimony to establish a prima facie case for plaintiff is privileged testimony of the following persons: (a) The pharmacist, H. C. Ludden; (b) Dr. Seech; (c) Martha Tucker, librarian at the Cedars of Lebanon Hospital, and Miss Duncan,

nurse employed at the Cedars of Lebanon Hospital; (d) Dr. Henry H. Lissner; (é) Dr. Maurice H. Rosenfeld; (f) Dr. Benning of the Sansum Clinic; (g) Mr. Spinney, superintendent of records of the Sansum Clinic. And the documentary proof or exhibits which were offered and received subject to objection on the grounds stated, as part of the examination of the witnesses enumerated; (h) Testimony of Mr. Brown; (i) The testimony of Mr. Arnold, and the testimony of Mr. Harris.

3. That independent of the testimony which was privileged, the testimony of the witnesses enumerated in the foregoing ground, is incompetent on the ground of establishing matters referring to the health and condition of health of the decedent, Abe Lutz, in that it is hearsay as to the defendant and counterclaimant Harry Lutz.

4. On the further ground that the plaintiff's complaint, and the exhibits attached thereto, being notice of rescission, affirmatively disclose that plaintiff has assumed a position of repudiating the policy in suit sued upon, and has denied all liability thereunder, and, as a matter of law is, therefore, prohibited and estopped from [107] claiming the benefits of the waiver referred to and made part of the policy in suit, by the incorporation of the application in its entirety as a part of the policy sued upon.

5. Upon the ground that, as a matter of law, the plaintiff is shown to have waived its right to information which is now claimed to be material as it relates to the health and condition of Abe Lutz under Secs. 335 and 336 of the Insurance Code of the State of California, particularly in that on the application, which is made part of the policy in suit, the deceased, Abe Lutz, furnished the plaintiff company with the name of his attending physician, Maurice H. Rosenfeld, on November 16, 1942,

and thereby placed at the disposal of plaintiff company the exact source of information, which source would have disclosed the information which is now claimed to be material and withheld from plaintiff company.

That under Sec. 336 the right to information of material facts was waived by neglect to make inquiries as to such facts where they were distinctly implied in other facts in which information was communicated. This last ground, your Honor, is the ground which we respectfully submit raises a pure question of law. If your Honor should rule at this time that presumptively the waiver in the policy is valid for the reason that the furnishing of a waiver of confidential communications by the deceased, together with the name of the [108] attending physician, coupled with the information that the decedent, in August of 1942, had been examined and had a physical examination by Maurice H. Rosenfeld, which information appears on the application, is deemed to carry to the insurance company the effect and knowledge of whatever information would have been disclosed by an investigation or statement obtained from the attending physician.

The Court: That motion will be given consideration, and will be decided before the close of the trial. You may proceed. For the purpose of putting on your proof you had better consider your motion is denied.

Mr. McGinley: May I ask this, your Honor: In view of the fact that there has been no ruling on the question of privilege, if counsel will stipulate that I might call Dr. Waste, a physician who consulted Mr.

Lutz, without prejudice to the objections I have heretofore made upon the ground of privilege, and the ground of hearsay.

Mr. Herndon: Your Honor, we hardly feel that that is a proper request. We don't know what counsel has in mind. It may be that he will be gaining a very substantial advantage to which defendant is not entitled by the procedure, and I can't quite see the fairness of the request.

Mr. McGinley: Your Honor, probably I should make this explanation; I am in this position: I am now required to put on my defense testimony. I am doing that without the benefit of a ruling from your Honor, on the matter of [109] privilege. Now, if your Honor should rule right now and say to me: Mr. McGinley, your objection to privilege is not sustained,—then I would know what my course would be to appraise the testimony that is available to us. Should your Honor say to me: Mr. McGinley, I think your objection is good,—of course, that would indicate another course to me; and if counsel is unwilling to stipulate I believe it to be within your Honor's discretion in directing the order of proof, that in view of the fact that there has been a reservation of ruling on the question of privilege, that I should not be prejudiced by calling a witness in order to expedite the trial, in the absence of a ruling.

The Court: So permitted. [110]

* * * * *

JOHN M. WASTE,

a witness called by and on behalf of the defendants' having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. McGinley: If your Honor please, I have had prepared a blown-up enlarged photograph of the application in suit, because of its smallness, and I think it would facilitate the examination of the witness and allow your Honor to have the original in your possession as I interrogate him, if I may use that photostat, merely for illustrative purposes.

The Court: Very well.

Q. By Mr. McGinley: What is your full name, doctor?

A. John Morton Waste.

Q. What is your profession?

A. Physician.

Q. How long have you been a practicing physician?

A. Since 1910.

Q. And how long have you practiced, or been admitted to practice your profession in the State of California?

A. Since 1917.

Q. At the present time do you specialize in any particular branch of the profession?

A. Physical examinations, since 1927.

Q. And since 1927 have you made examinations for any company, other than the Equitable Life Insurance Company? [111]

A. Yes, sir.

Q. And how long for a continuous period of time have you been making examinations of persons who apply for insurance?

A. Since 1919.

Q. Since 1919? I understand, doctor, that all of that time is devoted exclusively to making examinations on applications for insurance?

A. Since 1927.

(Testimony of John M. Waste)

Q. Where do you have your office?

A. 601 South Hill Street.

Q. Will you tell the court just generally what your office consists of in the way of equipment for making examinations?

A. It consists of a reception room, two examining rooms, and a laboratory for men and a separate room for women, for examinations.

Q. And that was the condition during the month of November, 1942?

A. Yes, sir.

Q. Did you know Abe Lutz during his lifetime?

A. Only through the acquaintance at examinations.

Q. And when did you first become acquainted with Mr. Lutz?

A. I am not sure, but I believe in 1942.

Q. And during the year 1942 did you make a physical [112] examination of Mr. Lutz?

A. Yes, sir.

Q. And where did that examination take place?

A. At our office, 601 South Hill Street.

Q. Was that examination in relation to an application for insurance?

A. Yes, sir.

Q. When did you next see Mr. Lutz?

A. I have examined him two or three different times. I think probably three times, during 1942, at different periods during the year. That's the only time I have seen him, on examinations.

Q. In connection with the examinations that you have referred to, have you examined him other than at the office you have described?

A. No, sir.

Q. You have not examined him at his home?

A. No, sir.

(Testimony of John M. Waste)

Q. Directing your attention, doctor, to the 16th day of November, 1942, did you make an examination of Mr. Abe Lutz on that day? A. Yes, sir.

Q. That examination was conducted where?

A. At our office, 601 South Hill Street.

Q. At whose request did you make the examination of Mr. Lutz on November 16, 1942? [113]

A. His agent, Mr. Leeds.

Q. Had you received information that the examination was to be made for the New England Mutual Life Insurance Company? A. Yes, sir.

Q. Were you furnished with a blank on the form of the New England Mutual Life Insurance Company?

A. Yes, sir.

Mr. McGinley: If your Honor please, may I look at the original for one moment?

The Court: Yes.

Q. By Mr. McGinley: Doctor, referring to the original application, Part 2, which is in evidence here, would you state if that is the form which was furnished to you for the purpose of making an examination of Mr. Abe Lutz? A. Yes, sir.

The Court: Give the exhibit number for the record.

Mr. McGinley: No. 2 in evidence.

Q. Will you kindly examine Exhibit No. 2 and state whether or not all of the writing on the face of Part 2 is in your handwriting, with the exception of the signature, Abe Lutz? A. Yes.

Q. Directing your attention to Exhibit 2, doctor, and particularly to Question 28: Has any insurance applied for [114] on your life ever been declined, postponed or modified as to kind, amount or rate? You will observe a

(Testimony of John M. Waste)

red crayon there. Will you state whether that red crayon was placed by you on the face of the policy?

A. No, sir.

Q. Directing your attention to Question No. 39 reading as follows, on Exhibit 2: Have you ever had or been suspected of having sugar or albumen in urine? And the red crayon mark which appears to the left of the statement "Sugar or albumen in urine", will you state whether or not you placed the red crayon mark opposite that information?

A. No, sir.

Q. Directing your attention to four questions on Exhibit, Questions 31, 32 and 33 and 34, at the end of which appears a red crayon mark, will you state whether or not you placed that red crayon mark on the face of the application, Exhibit 2?

A. No, sir.

Q. When you had completed your examination of Mr. Lutz none of the red crayon marks, which I have directed your attention to were on the application, as I understand it?

A. No, sir.

Q. As you commenced to examine Mr. Lutz, will you describe to the court the seating arrangement in your office; where Mr. Lutz sat and where you sat, and where the blank application rested? [115]

A. I sat at my desk, like I am sitting now. On the opposite side the applicant usually sits. The application lies in front of me, just like this is placed on the stand here.

Q. And what did you say to Mr. Lutz as you commenced the examination, *Mr. Lutz*?

A. Do you mean in the way of introduction?

Q. Yes, as nearly as you can recall.

A. Well, we usually say "How do you do? I am glad to see you again" something like that, and "Have I ever

(Testimony of John M. Waste)

examined you before?" That is just a sort of introductory conversation we have; and then we proceed to ask him the questions.

Q. Referring to Question 29, and if you wish, doctor, with the court's permission, if the enlarged photograph is more readable on the board, you may refer to that,—please state what you said to Mr. Lutz and what Mr. Lutz said to you.

The Court: It is my understanding, however, that we may be clear, that this examination of this witness, in so far as it may involve confidential matters is without prejudice in the event that I rule there is a privileged communication involved in the testimony of Dr. Rosenfeld, but in the event that I hold that there is no confidential communication, then the evidence stands as a part of your testimony. [116]

Mr. McGinley: That is right, your Honor.

The Witness: What is the question?

The Court: Read it.

(Question read by the reporter.)

A. I can read it better off of here than I can off of there.

The Court: All right.

A. 29; What illnesses, diseases or injuries have you had since childhood? Describe fully? The answer to this do you want?

Q. Go right ahead,—whatever Mr. Lutz said.

A. He gave me influenza, 1918, duration two weeks, mild severity, good results. Slight colds occasionally; none for two years; mild, good results. That's the answer to that.

(Testimony of John M. Waste)

Q. At this examination did you ask Mr. Lutz if he had ever applied for insurance and been declined?

A. That question is Question 28.

The Court: That is not what counsel asked you. Counsel asked you if you asked him that question. You should answer yes or no. A. Yes.

Q. By Mr. McGinley: Will you tell us what you asked Mr. Lutz in that connection, and what he said?

A. I will have to quote my reading here—my writing: Declined, Equitable Life, a few years ago. Standard [117] insurance issuance since. Declined, Equitable Life a few years ago. Standard insurance issued since.

Q. Doctor, did you know on November 16, 1942, independent of your acquiring the information at this examination of Mr. Lutz, that he had been declined for insurance?

Mr. Herndon: That is objected to, if your Honor please, as being wholly immaterial; no foundation laid; not binding on the plaintiff.

The Court: Objection sustained.

Q. By Mr. McGinley: Did I understand you to state, doctor, that you had, prior to November 16, 1942, made an examination of Mr. Lutz for insurance in the Equitable Life?

Mr. Herndon: That is objected to, if your Honor please, on the same grounds, being wholly immaterial; any knowledge that the witness might have had at some previous time would not be binding upon this plaintiff.

The Court: You may answer yes or no.

A. What is the question?

(Question read by the reporter.)

A. Yes.

(Testimony of John M. Waste)

Q. By Mr. McGinley: And was the fact of that examination noted by you at any place on the application which you were preparing for the New England Mutual Life Insurance Company?

Mr. Herndon: If your Honor please, that is objected to upon the ground that the application itself is the best [118] evidence of what appears thereon.

The Court: Objection sustained.

Q. By Mr. McGinley: Did you make use, doctor, of any information you had previously acquired in examining Mr. Lutz, to fill out the application, Part 2, in Exhibit 2 in evidence? A. No.

Q. Again directing your attention to 28, which reads as follows: Has insurance applied for on your life ever been declined, postponed or modified as to kind, amount or rate? I note the answer: Equitable Life—a few years ago—standard issue since. Is that information that was received from Mr. Lutz on November 16, 1942?

A. Yes.

Q. Referring to Question 37: Have you ever had or been suspected of (c) sugar or albumen? Will you state what you said to Mr. Lutz in that connection, and what his answer was?

A. I asked him the question 37, and his answer was as I have written it here: Yes.

Q. Was any explanation, other than the response "Yes" given by Mr. Lutz, doctor?

A. Not that I remember.

Q. Now, directing your attention to the application, Plaintiff's Exhibit No. 2, and to Question 35 thereon:

(Testimony of John M. Waste)

Have you ever suffered from nervous strain or depression? [119] Did you ask Mr. Lutz that question?

A. Yes.

Q. And what was his answer? A. No.

Q. In the course of your examination did you make any tests on November 16, 1942 to determine whether or not the answer "No" given by Mr. Lutz was true or false?

A. There is no way of determining that other than to test out his reflexes for nervous sensations, and as far as a man being depressed, I had no way to test that. I tested his nervous reflexes and found them normal.

Q. You found his reflexes normal?

A. Yes, sir.

Q. Now, at the same time, Question 35: Did you inquire from Mr. Lutz relative to palpitation of the heart? A. Yes, sir.

Q. And what was his answer? A. No.

Q. Did you, as part of that examination, make any test to determine whether or not the answer given by Mr. Lutz was true or false?

Mr. Herndon: That is objected to, if your Honor please, upon the ground that it is immaterial. The only issue here is whether or not the insured truthfully answered the questions in the application. Unless there is a background showing that the answer had been truthfully given by [120] the insured to the medical examiner, the witness here was purely in misconduct to negligently fail properly to record the answer. Any other examinations or any other knowledge that the witness might have had or acquired in any way whatsoever would not be binding on the plaintiff under the authorities.

(Testimony of John M. Waste)

The Court: Let me see the application. Read the question.

(Question read by the reporter.)

The Court: Well, if the answer to that question were No, that will be the end of it; if it were Yes, then, of course, it might involve the integrity of the witness. It might be good impeachment, but you can't impeach your own witness.

The Witness: Your Honor, may I explain a little bit about these examinations?

The Court: Certainly.

A. This first page here that we are discussing now is the history as given to us by the applicant. These are his statements to me when I asked him the questions.

The Court: Let us modify that question in order that it be within the proprieties in connection with Question 35, Subdivision (f): Palpitation of heart. Did you make any independent examination?

A. May I explain what I wanted to say a moment ago? Yes, I did, but not at this time. [121]

Q. I particularly said in connection with that particular question, did you make any examination, or did you simply take his statement?

A. Do you mean did I do it at that time, or later?

Q. Yes.

A. Later, after we did this, we took him in the office, and we examined him.

Q. That is a different thing entirely. But, here you simply took his answer down, without at that time making any independent investigation, or previously having made an independent investigation? A. Yes.

The Court: The answer then would be No.

(Testimony of John M. Waste)

Q. By Mr. McGinley: Now, on the same day, November 16, 1942, and before you had completed with the physical examination of Mr. Lutz, did you make an independent test relative to palpitation of the heart?

A. Yes.

Q. And that examination was in the clinical part of your office establishment, at the address given?

A. Yes.

Q. Will you tell the court what examination or test you made relative to palpitation of the heart, and what your findings were?

A. We listened to his heart with our stethoscope; we feel the impulse, and we percuss it for enlargement, and [122] count the heart beats; whether they are regular or irregular.

Q. What were your findings on November 16, 1942, relative to the condition with respect to the palpitation of the heart of Abe Lutz?

A. No abnormal findings, if I remember.

Q. Can you refresh your memory by referring to the medical report which is on the reverse side of Plaintiff's Exhibit No. 2, relative to the tests made by you concerning palpitation of the heart?

A. Heart or blood vessels.—Any evidence of past or present diseases of? Answer: Heart or blood vessels, no.

Q. And that notation that you just read is from the medical report that you made to the plaintiff, insurance company, following your examination of Mr. Lutz on November 16, 1942? A. Yes.

Q. Again referring to Plaintiff's Exhibit 2, Question 35, and that portion (g) which refers to shortness of

(Testimony of John M. Waste)

breath, may I ask you, doctor, if, on November 16, 1942, you made an independent test in the clinical part of your offices to determine the condition of Abe Lutz with respect to shortness of breath? A. Yes.

Q. And will you tell the court what you did in making that examination or test, and what your findings were?

A. That test was made by listening to the lungs, count- [123] ing his respiration, and having him breath deeply and inhale and exhale. My answer to that is: Lungs or respiratory tract, any evidence or past or present disease?—My answer is: No.

Q. And having in mind, doctor, the age of Abe Lutz on November 16, 1942, as being 64, were your findings in regard to shortness of breath in your opinion normal?

A. Yes.

Q. Again referring to Question 35, and that portion opposite the letter (h) Pain or pressure in chest? Will you state whether on November 16, 1942 you made an independent test as part of the examination of Mr. Lutz with reference to pain or pressure in chest?

A. There is no real test or examination that we can give to tell whether a man has got pain in his chest or not, unless he tells us himself.

The Court: In other words, the answer is No.

A. No.

The Court: That is subjective matter.

Q. By Mr. McGinley: Referring to the division (e) of Question 35: Dizziness and fainting spells? Will you please tell us, doctor, on November 16, 1942, whether you made an examination of Abe Lutz with reference to dizziness or fainting spells?

A. We always have them stand and close their eyes, and see whether they sway or not. Looking at a person

(Testimony of John M. Waste)

you can [124] tell whether he is fainting or not. The answer is No.

Q. On November 16, 1942, what were your findings with regard to Abe Lutz in respect to dizziness or fainting spells? A. No is the answer.

Q. By the Court: Now, doctor, you don't mean to say just because he didn't faint while you had him standing with his eyes closed, that you can tell anything as to whether he had had fainting or dizzy spells in the past, can you?

A. No, that is not the question he put to me, I don't believe.

Q. What does the question state there? Read it.

A. This is his answer.

Q. Read the question.

A. It says: Have you ever suffered from dizziness or fainting spells? I asked him the question.

Q. The question is, Did you make any objective test to determine the correctness of the answer "No" to that?

A. Examination of his heart and pulse and blood pressure would indicate at that time he wasn't fainting, if that is what you mean.

Q. I am asking you what you mean.

A. I couldn't tell by examining a man now if I found his pulse normal and his blood pressure normal and his heart normal, whether he had fainted before.

Q. Exactly. In other words, by your answer you mean [125] that the only test is to determine whether at that particular time he had any dizziness or fainting?

A. That's right.

Q. But you did not make a test to determine whether it happened in the past? A. No, I did not.

(Testimony of John M. Waste)

Q. By Mr. McGinley: On November 16, 1942, did you make a blood pressure test, doctor?

A. Yes, sir.

Q. Did you report your findings to the plaintiff company in that connection?

A. It is all on the back; his answer and my findings on this.

Q. What was the blood pressure of Mr. Lutz on November 16, 1942?

A. Systolic pressure, 134; diastolic, 84 - 78.

Q. Having in mind the age of Mr. Lutz on November 16, 1942, in your opinion did his condition indicate a normal state of health?

A. Yes, sir.

Q. And in your opinion did these tests indicate that Mr. Lutz was in a good state of health?

A. They indicated that his blood pressure was normal and his arteries apparently were normal, as far as the blood pressure is concerned.

Q. On November 16, 1942, in making the examination [126] relative to the heart and chest, did Mr. Lutz bare his chest?

A. Yes.

Q. Tell the court what was done in making that examination to determine the condition of Mr. Lutz' heart, on November 16, 1942?

A. I examined him with our stethoscope to see if there are any murmurs. We percussed his heart, to see if there is any enlargement; we span the impulse of his heart, to see if it is within the normal range; we also listen to the heart beat.

Q. What findings with reference to the heart did you make on November 16, 1942, as part of the examination?

A. Heart and blood vessels normal.

(Testimony of John M. Waste)

Q. And having in mind that Mr. Lutz was 64 years of age, is it your opinion that his condition of health was good?

A. Yes; it appeared to me that his health was good at that time.

Q. In your medical report, I notice that a Romberg test was given Mr. Lutz on November 16, 1942.

A. Yes, sir.

Q. What purpose did you have in mind in giving the Romberg test?

A. The Romberg test is a test where the patient stands in front of you, or the applicant, closes his eyes and you watch to see whether he sways one way or the other, or not, to test his equilibrium. That is indicative, swaying from [127] one side to the other, or a positive Romberg, is indicative of some unusual nerve involvement of his spinal cord or central nervous system. That was negative.

Q. The results of the Romberg test were negative?

A. Negative, yes.

Q. I notice in the medical report that was furnished to plaintiff insurance company that you note the expansion and depression of the chest on respiration, is that right, doctor?

A. Inspiration and expiration.

Q. What purpose did you have in mind in making that test?

A. To test the lung capacity of the applicant, as to whether or not he had full inspiration or whether or not it would indicate—in other words, a slight inspiration, a slight difference between the two would indicate probably some lung involvement, but when he has a full inspiration and a normal expiration, with a difference between the two, we will say from two and a half to four inches, then we would consider that his lung capacity is normal.

(Testimony of John M. Waste)

Q. Is that the condition that in your opinion Mr. Lutz was in on November 16, 1942, that is, being normal for his age?

A. Inspiration 41; expiration 37½, which indicates a normal respiratory movement.

(Short recess.) [128]

Q. By Mr. McGinley: Doctor, again referring to Question 35, subdivision (d): Overwork, to which an answer No is noted. Can you refresh your memory from this application, and give us the substance of the conversation you had with Mr. Lutz about overwork?

A. Well, I asked him these questions, and asked him if he had been overworked, and he said No.

Q. And the manner in which you stated the question, is that the way you put it to him, Dr. Waste?

A. Yes, I asked him if he had suffered from overwork.

Q. And with regard to subdivision (b) to Question 35, will you state how you put the question of Mr. Lutz with reference to insomnia?

A. I asked him if he slept well. He said Yes. That answer would be No for insomnia.

Q. On November 16, 1942, when you made this examination, did you have a conversation with Mr. Lutz about indigestion?

A. I asked him that question.

Q. As nearly as you can recall what did you say, doctor, to Mr. Lutz about indigestion?

A. I asked him if he had ever suffered from indigestion or had any pains in his stomach or bowels, and the answer was No.

Q. Doctor, in noting the No answer to the various subdivisions of Question 35, you did not put down the entire answer of Mr. Lutz, did you? [129]

(Testimony of John M. Waste)

Mr. Herndon: If your Honor please, that is objected to on the ground that the application itself shows what was placed thereon.

The Court: I think so. He has answered as to each question categorically, and this is just self-evident.

Q. By Mr. McGinley: In regard to Question 32, Dr. Waste, which is as follows: In the last two years how much has your weight increased? And then a blank space. Then the word Decreased. Will you state the manner in which you asked that question, and the full response of Mr. Lutz?

A. We asked him if his weight—if he had gained in weight or lost weight within the last two years, and his answer was a decrease of about 15 pounds.

Q. Is that all he said?

A. I don't remember of his saying anything else. There is an explanation to that in Question 71.

Q. What question was that?

A. 71, on confidential information.

Q. You are referring now to the medical report to the insurance company? A. Yes.

Q. Does the explanation that you are about to give refer to information given to you by Mr. Lutz on November 16, 1942?

A. That is possibly his conversation leading up to his [130] answer of a decrease of 15 pounds.

Q. What was the conversation in that respect, doctor?

A. I would have to quote my answer from the beginning. I can read that again to you: A change in weight gradual. Last summer realized he was getting too heavy so began cutting his diet, and doing a little more active work. No change in weight for three

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months. He looks well.—That's my comment to that remark.

Q. Doctor, can you state whether you recall his giving any reason as to why he was too heavy on November 16, 1942?

A. I believe I discussed it with him a little bit. I did not write it down, because I thought it was immaterial. I believe he had taken a trip east, or on a vacation, or something, and he had rested a great deal, and he had had a lot of good meals, and came back with a few pounds more than he should have weighed, or he thought he should have weighed, and I think this is the reduction back to normal, probably to take off the weight he had gained on his trip. I believe that is the conversation I had with him.

Q. Did you make a urine test? A. Yes.

Q. For sugar or albumen, on November 16, 1942?

A. Yes.

Q. Will you tell the court, as nearly as you can recall, and if it is necessary, doctor, to refresh your memory from anything that appears in the document before you, the full [131] conversation you had with the decedent relative to sugar or albumen in the urine?

A. We asked him that question. That is one of the questions here, if he ever had albumen or sugar in his urine. The answer that he gave to that was Yes. We analyzed it ourselves, but on this examination at this time I did not find any sugar. Specific gravity of urine 1018. That is considered normal. [132] Albumen, none; sugar, none. That was on our chemical analysis, in our laboratory.

(Testimony of John M. Waste)

Q. Have you given us, as nearly as you can recall, everything that was said by the decedent relative to the urine test?

A. Well, Mr. Lutz had had a history of diabetes, and had been rejected from life insurance on account of having sugar in his urine, on previous examinations, and naturally I knew that and I probably discussed that with him a little bit. That might have been some of my conversation at that time, because I had examined him several times before this. I think you can find that record probably.

Q. Will you state whether the deceased told you that he had had a urine test made by Dr. Maurice H. Rosenfeld?

A. Yes, sir.

Q. What did he say with reference to Dr. Maurice H. Rosenfeld on November 16, 1942?

A. That question is answered in 44: Dr. Maurice H. Rosenfeld, August, 1942. This is what he told me; physical examination and blood sugar determination. Report which was normal.

Q. Did the deceased tell you that the blood sugar test was normal, or did you arrive at that conclusion from your own analysis of the urine specimen?

A. I hadn't made the examination of the urine at this time. That came later. That was the report that he told me [133] it was normal.

The Court: Is that your handwriting?

A. That's my handwriting, but this is on the history side.

Q. His address, 1908 Wilshire Boulevard?

A. Yes.

Q. Did you just fail to put in "Wilshire Boulevard"?

A. That's right.

(Testimony of John M. Waste)

Q. You did not make an error; you just failed to put in "Wilshire Boulevard"? A. I omitted it, yes.

Q. By Mr. McGinley: At the time you made the examination of Mr. Lutz on November 16, 1942, state whether you knew that Maurice H. Rosenfeld was a heart specialist, doctor?

Mr. Herndon: I object to that as immaterial; no foundation laid, and not binding on the plaintiff.

The Court: Objection sustained.

Q. By Mr. McGinley: Have you give us, doctor, the conversation as best you can remember, with Abe Lutz, relative of his having seen Dr. Maurice H. Rosenfeld? A. Yes, as nearly as I remember.

Q. The court has suggested that the full address of the doctor was not listed on your item 44. Does that refresh your memory as to whether or not Mr. Lutz said that he had consulted Dr. Maurice H. Rosenfeld at 1908 Wilshire Boulevard? [134]

A. No, that's the office address of the doctor he consulted.

Q. From whom did you get the office address of Dr. Maurice H. Rosenfeld?

A. I knew it. That's where his office was.

Q. And you note under 44, special information: Physical examination and blood sugar determination.

A. Yes.

Q. Will you state whether there were two items of information given to you by the deceased? A. Yes.

Q. They were—

A. Physical examination and blood sugar determination. Blood sugar determination is a laboratory test, and it is really not considered a physical examination.

(Testimony of John M. Waste)

Q. I did not get the last remark, doctor.

A. Physical examination. I understood from him that he had a physical examination by the doctor, and also had a blood sugar determination test.

Q. When Mr. Lutz said that he had a physical examination, did he tell you when he had that examination?

A. I got the date August, 1942. That was the best he could remember, I guess.

The Court: That was the date of both the blood sugar test and the physical examination? A. Yes, sir. [135]

Q. By Mr. McGinley: When the deceased said that he had a physical examination by Dr. Maurice H. Rosenfeld in August, 1942, did you inquire from the deceased the details of the physical examination?

A. He said he had a general physical examination, checked his heart, blood pressure, and listened to his chest, which is understood usually when you say a physical examination.

Q. Now at that time, Dr. Waste, when he said that he had had his heart checked and a physical examination by Dr. Maurice H. Rosenfeld, did he tell you what Dr. Rosenfeld had said? A. No, sir.

Q. And did you ask him what Dr. Rosenfeld had found with reference to his general physical condition and his heart?

A. I asked him what was the result of the examination, and he said the report was normal.

Q. And you understood that as referring both to the blood sugar determination test as well as the general physical examination? A. Yes, sir.

Q. In noting the special information under question 44, did you ask Mr. Lutz when he was last consulted by

(Testimony of John M. Waste)

Dr. Rosenfeld, or the times that he had been consulted by Dr. Rosenfeld? [136] A. I have August, 1942.

Q. Did that refresh your memory, doctor, as to whether you asked the deceased when he last had seen Dr. Rosenfeld, or if he had had a number of consultations with Dr. Rosenfeld?

A. I believe this was the last time that he had consulted a doctor.

Q. And that was the purpose of your making the written memorial: Dr. Maurice H. Rosenfeld, August, 1942? A. That's right.

Q. What was the weight of the deceased on November 16, 1942? A. 180 pounds.

Q. In making the medical report to the plaintiff company, following the examination of Mr. Lutz on November 16, 1942, did you make any recommendations as to Mr. Lutz in your opinion being an insurable risk?

Mr. Herndon: If your Honor please, that is objected to upon the ground that the report of the medical examiner speaks for itself.

The Court: Objection sustained.

Q. By Mr. McGinley: In your opinion, doctor, on November 16, 1942, having in mind the age of the deceased, was he an insurable risk for insurance?

A. Yes.

Q. In making the medical report to the plaintiff company, following your examination, did you rely on any [137] examination you had acquired prior to November 16, 1942, with reference to the health and condition of the deceased?

Mr. Herndon: That is objected to, if your Honor please, as being immaterial. The only material matter is

(Testimony of John M. Waste)

what the examination—what the answers were of the insured, and what the report of the medical examiner was as made to the plaintiff.

Mr. McGinley: If I may state my purpose: In the medical report that was forwarded to the plaintiff company, in the space provided for Comments, the opinion of the doctor regarding this risk, he recites the fact that the deceased had recently been either examined or granted a policy in the Equitable Life, and the purpose of my question is to show that in making that statement in the medical report to the plaintiff company, of necessity it would refer to the examination that the doctor had made in connection with that statement.

The Court: Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. No.

Mr. McGinley: That answers that.

Q. Referring to the medical report, and particularly to the recital that the applicant had been granted a policy, does that refresh your memory as to whether you based your report to the plaintiff company on information that had been acquired prior to November 16, 1942? [138]

A. I answered that.

The Court: Hasn't he already answered that question? He says that he got the information on that day; in other words, Mr. Lutz told him he had been accepted by the Equitable, and he put it in the report. He said he did not base it on anything other than what he acquired at the time of this examination, is that correct?

A. Yes, sir. He gave me that statement on the history side.

(Testimony of John M. Waste)

Q. By Mr. McGinley: Doctor, how long in the matter of time, did your examination of Mr. Lutz take, on November 16, 1942?

A. The average is about a half an hour, for the physical examination.

Q. And it would be your judgment that that examination lasted that long?

A. About a half an hour, yes, sir.

Q. Does that include the answering of questions as well as the clinical examination that you made, Doctor?

A. Yes, sir.

Q. After you had completed interrogating the deceased, will you describe what you did with Plaintiff's Exhibit 2, being the application, Part 2?

A. Do you mean after we had finished the history?

Q. Yes.

A. I think I told you that; examined the heart, and [139] the taking of his respiration.

Q. After you had finished that, Doctor? I did not make my question clear.

A. After I had examined him, and checked his respiration, we palpitate his stomach, usually feel to see if he has got any tumorous masses, tender spots, and we test his reflexes and look over, for deformities, the bones, spine, and look at his mouth usually to see if he has an inflamed throat. We usually find by talking to him whether he is deaf or not, before we are through the examination, and we examine his eyes, his vision. I believe he wore glasses, and he had a normal correction. I believe he said, in his eyes. We examined him, to look to see if we can find anything abnormally wrong with him, so we can report it in our confidential information on the back of our medical report.

(Testimony of John M. Waste)

Q. The medical report, which is on the reverse side of the application, that is not exhibited to the applicant, is that right, doctor? A. No, sir.

Q. That is something that is confidential, between yourself, as examining physician, and the home office of the plaintiff company? A. Yes, sir.

Q. Will you describe to the court the manner in which you handed the application to the deceased to obtain his signature? [140]

A. After we have completed all the questions that we usually ask him if that is all his history he has, and if they say yes, that is all; if they say no, then we add it. Then we turn this around, and ask him if he will sign this now, on his history; we turn it around like this. He has the privilege of looking it over, and then signs it.

Q. What was done in this case, doctor, was the routine that you have just described, which you followed with reference to obtaining the signature of Mr. Lutz?

A. Yes, sir.

Q. Is there any portion of the application, part 2, Plaintiff's Exhibit 2 in evidence, which you would use, on November 16th, to note the source of information to the answer given in 35?

A. Repeat that again, please?

Q. Kindly read it.

(Question read by the reporter.)

Mr. Herndon: That is objected to, your Honor, upon the ground that it is unintelligible.

The Witness: I can't understand the question.

The Court: Objection sustained.

Mr. McGinley: That is all the examination.

(Testimony of John M. Waste)

Cross-Examination

Q. By Mr. Herndon: Is it not a fact, Dr. Waste, that a man may suffer from a serious disease of the heart and the circulatory system, which will not be disclosed by an ordinary [141] physical examination such as you state you made in the case of Mr. Lutz?

A. I don't understand what you mean by serious. There are so many different kinds of heart condition.

Q. I will ask it this way: Is it not a fact, Dr. Waste, that a patient may have arteriosclerosis, and that disease will not be disclosed by subjective manifestations observable on such examination as you state you made in the case of Mr. Lutz?

A. Do you mean regarding the heart alone, in that examination?

Q. Yes. A. Will you state it again now?

Q. Will you read the question, Mr. Reporter?

(Question read by the reporter.)

Mr. Herndon: May I amend the question? I mean objective, instead of subjective.

A. Read the question.

(Question read as follows: Is it not a fact, Dr. Waste, that a patient may have arteriosclerosis, and that disease will not be disclosed by objective manifestations observable on such examination as you state you made in the case of Mr. Lutz?)

The Court: Do you mean a single examination? Just one examination?

Mr. Herndon: Yes. [142]

A. Might not be revealed?

Q. That's right. A. Yes.

Q. Is it not true, Dr. Waste, that a patient may be suffering from angina pectoris, and yet a doctor on mak-

(Testimony of John M. Waste)

ing such an examination as you state you made in the case of Mr. Lutz will not find the existence of that disease by objective manifestations? A. Yes.

Q. Doctor, assuming that a patient suffered from dizziness and vertigo in January of 1937, to such an extent that the patient was unable to arise from his bed; that in January, 1937, the patient was found to have ruptures of the small vessels in the posterior portion of the eye; that on June 1, 1942, the patient complained of having suffered pain in the chest; that again, in August, 1942, the patient had suffered from pain in the chest, and that on two occasions during the period between January 1, 1942 and November 1, 1942, the patient had suffered gas pains,—would you say that such patient was in good health and an insurable risk?

Mr. McGinley: That question, your Honor, is objected to upon the following grounds: First, it is not proper cross examination; secondly, it is a hypothetical question which assumes facts not in evidence, in that the recital of the basis for that hypothet is based upon testimony which has been previously objected to as being privileged and hearsay. [143]

The Court: As I have said many times before, the question does not need to contain all the elements. It seems to me it is proper cross examination, because of the scope of the direct examination. You asked the witness if the man was in good health; you asked him whether at that time he was an insurable risk. Now, on cross examination, he is asking him in effect, if he would have been in good health, or a good insurable risk, if these other things had been present. You may answer.

A. I want you to say it again.

(Testimony of John M. Waste)

Q. By Mr. Herndon: Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. No.

Q. By the Court: If the patient had told you these things as part of his history, or any part of them, would you have written them down on the chart as part of your comment? Would you have made a note of them?

A. Yes, sir.

Q. By Mr. Herndon: Assume, Doctor, that a patient had suffered from dizziness and vertigo in January of 1937, to an extent that he was unable to arise from his bed; that in June of 1942 the patient consulted a physician, complaining of pain in the chest, and that on the occasion of such consultation, and after making an examination, including the taking of an electrocardiogram, the physician prescribed [144] nitroglycerine; that in July of the same year, 1942, the patient was again examined by a physician, and as a part of the examination an electrocardiogram was taken; that in August of 1942, after examination was made by the same doctor, at that time the patient complained of having suffered pain in the chest, and was advised to continue to take nitroglycerine tablets,—would it be your opinion that such patient would be considered an insurable risk in November of 1942?

Mr. McGinley: That question, your Honor, is objected to on the ground that the hypothetical question assumes facts not in evidence, in that the facts assumed as a basis for the hypothet, at this stage, is a privileged communication, and constitutes hearsay as far as the counter-claimant is concerned.

(Testimony of John M. Waste)

The Court: We will take the evidence subject to a motion to strike, pending the ruling on that particular question. Is that your understanding?

Mr. McGinley: Yes, your Honor.

The Court: The ruling will be the same. You may answer.

A. Would he be considered a good risk, did you say?

Mr. Herndon: Yes.

A. No.

Q. When you expressed the opinion, in response to a question by counsel for the defendant, that Mr. Lutz was in good health on November 16, 1942, you based that opinion [145] entirely, did you not, upon your examination on that date, and the history related to you by Mr. Lutz?

A. Yes.

Q. In the course of your examination of Mr. Lutz, on November 16, 1942, did you test his eyes?

The Court: I don't know that that is quite an intelligible question. He said that he tested his eyes for vision, but do you mean did he make an examination of them with an instrument to determine what the condition was as to blood clots, and so forth?

Mr. Herndon: I intended to ask him if he tested his visual acuity, your Honor.

The Court: He can answer that easily.

A. What date was that?

The Court: The date of the insurance examination, on November 16, 1942.

A. I probably did. I have answered that question: Eye or middle ear diseases? None. I apparently tested his vision.

(Testimony of John M. Waste)

Q. By Mr. Herndon: Isn't it a fact, Dr. Waste, that you tested Mr. Lutz's eyes on November 16, 1942, making use of the Snelling and Jaeger test charts?

A. I believe I did. I knew he wore glasses. I believe I checked his vision with glasses to be 20/20, corrected with glasses.

Mr. Herndon: May I show this to counsel, your Honor? [146]

Q. I have shown counsel, and I now show the witness a card with the statement at the bottom: Jaeger's test types, and I will ask you whether or not you recall using this chart which I now hand you, in making your test of Mr. Lutz's eyes on November 16, 1942?

A. Yes; we have a little different form, but it is the same test.

Q. On the card that you used in the case of Mr. Lutz were all of the same printing?

A. Not quite so fine. We run from about No. 3, we call it, 3 to 10. It is about that same size as the fine print on those forms.

Q. The card that you used in the case of Mr. Lutz had on it the printing the size of Nos. 3 to 10?

A. Yes, sir, about that. That's a little card they put out, I suppose, to carry around with you. I don't know. We have a big chart that we have them read.

Q. Tell us, using the card which I have handed you for illustration, how you tested Mr. Lutz's eyes with that card.

A. We just hold it in front of him, or let him hold it, and he tells us which one of these letters or numbers of the type that he can see.

(Testimony of John M. Waste)

Q. Did you ask the patient, or did you ask Mr. Lutz to read any of the writing appearing on the card?

A. Asked him what letter that is, and what letter that [147] is.

Q. What were your conclusions as to his vision, after having made the test?

A. I concluded he could see letters of normal reading size.

Mr. Herndon: At this time, if your Honor please, I will offer in evidence the chart.

The Court: It may be received to explain the testimony of this witness.

The Clerk: Plaintiff's Exhibit 28.

The Court: Any further questions?

Mr. Herndon: No further questions, your Honor.

The Court: Any further redirect?

Mr. McGinley: Nothing further. [148]

* * * * *

HOWARD L. HARRIS,

a witness called by and on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: You may state your name, please.

A. Howard L. Harris.

Direct Examination

Q. By Mr. Herndon: Where do you reside, Mr. Harris? A. I live in San Marino, California.

Q. By whom are you employed?

A. The Equitable Life Assurance Society of the United States.

Q. In what capacity are you employed?

A. As a claim investigator.

(Testimony of Howard L. Harris)

Q. How long have you been employed in that capacity? A. Since August 1, 1942.

Q. In the course of your employment did you ever have occasion to investigate the case of Abe Lutz with respect to the cause of his death? A. I did, yes.

Q. I will now show you Plaintiff's Exhibit No. 11, and ask you whether or not you have previously seen that document? A. Yes, I have.

Q. Did you ever have that document in your possession? A. Yes, I did.

Q. From whom did you receive it? [15]

A. These documents, authorizations, are sent to us in the claim department through the cashier's office.

Q. Did you, in the course of your investigation interview Dr. Maurice H. Rosenfeld? A. I did, yes.

Q. Will you state whether or not you exhibited to Dr. Rosenfeld Plaintiff's Exhibit No. 11 at the time you consulted him?

A. Yes, I did, I presented an authorization to Dr. Rosenfeld.

Q. Do you know whether or not it was Plaintiff's Exhibit No. 11, or whether it was a document containing the same material? A. I don't know.

Q. Do you remember by whom it was purported to be signed? A. By Harry Lutz.

Q. Will you state the substance of what was said in the course of your interview with Dr. Rosenfeld?

Mr. McGinley: If your Honor please, the defendants object to the conversation between Dr. Rosenfeld and this gentleman on the following grounds: First, that such testimony would be hearsay, and not part of the *res gestae*, and therefore, not binding on the defendant Harry Lutz; secondly, there has been no foundation laid that

(Testimony of Howard L. Harris)

would make competent the disclosure of testimony from Dr. Rosenfeld for [16] the reason that it affirmatively appears during the time in question Dr. Rosenfeld was a physician, and the deceased, Abe Lutz, was his patient, and under Sec. 1881, sub 4 of the California Code of Civil Procedure, such testimony would be incompetent and privileged; third, the purported authorization has not been shown to be binding on the deceased, Abe Lutz, in that the privilege under Sec. 1881, sub 4, is personal to the patient, and the foundation laid as far as it goes purports to show a waiver by Harry Lutz, son of the deceased, and, lastly, there has been no proper foundation showing that this witness is acquainted or familiar with the signature of Harry Lutz, and also, if I may add this, your Honor, it appears from the exhibit for identification, the purported waiver authorizing the disclosure of the information from Dr. Rosenfeld is a limited, and not a general, waiver, and is directed to the Equitable Life Insurance Company, and not to the New England Mutual Life Insurance Company, the plaintiff in this action.

Mr. Herndon: I am concerned with one element of the objection primarily, at this time, your Honor, and I wonder if I might properly ask counsel if it will be stipulated that the signature of Harry Lutz, whether the purported signature of Harry Lutz on the authorization, Plaintiff's Exhibit No. 11, is genuine, or whether it will be necessary to call Mr. Harry Lutz to ascertain that preliminary fact.

The Court: You may ask him. [17]

Mr. McGinley: May I show this to Mr. Lutz, who is in court? If he says it is his signature I will so stipulate. In response to counsel's request, your Honor, the defend-

(Testimony of Howard L. Harris)

ant stipulates that the signature appearing on Exhibit No. 11 for identification is the signature of Harry Lutz.

Mr. Herndon: May I ask one or two questions preliminary to the question now pending?

Q. Will you state whether or not you left a copy of an authorization containing material which is contained in Plaintiff's Exhibit No. 11 at the Cedars of Lebanon Hospital?

A. I left an authorization there. If I can see it to refresh my memory?

Q. Now, I show you Plaintiff's Exhibit No. 11, and I will ask you whether or not that appears to be identical with the document which you left at the Cedars of Lebanon Hospital?

A. Yes, sir.

Mr. Herndon: The plaintiff will now submit to your Honor's ruling on the previous question.

The Court: May I see the document, please? How are you going to get around the hearsay phase of this matter?

Mr. Herndon: The sole purpose of the offer of evidence, your Honor, is simply this: To show that with the authorization signed by the defendant and counter-claimant, Harry Lutz, waiving privileged, this witness went to Dr. Rosenfeld and to the Cedars of Lebanon Hospital, and was given all of the [18] information which is now claimed to be privileged. The materiality of it, as we view it, is established.

(Discussion.)

The Court: Will you be willing to stipulate that Harry Lutz, the son of the decedent, and beneficiary under the policy in suit, signed and delivered this waiver to the representative of the Equitable Life Insurance Company on or about June 7, 1944?

(Testimony of Howard L. Harris)

Mr. McGinley: Yes, your Honor, I so stipulate.

The Court: With that stipulation it may be received for what it is worth. Clearly, the information that he gained from Dr. Rosenfeld would be hearsay, and would not be binding on the defendant.

Mr. Herndon: I think this inquiry could be very largely shortened, your Honor, by a stipulation that this witness would testify that he went to Dr. Rosenfeld's office, and that Dr. Rosenfeld did disclose to him the fact that he was consulted by the insured, and treated him, and revealed in a general way the matters to which the doctor has testified; not all of the matters, but he revealed certain of the matters, and his diagnosis, and he also revealed to this witness the fact that he had taken electrocardiograms; and that substantially would be what the witness would testify the doctor told him.

The Court: I don't imagine the defendant would enter into such stipulation. I would not ask him to, but it seems [19] to me, as far as we can go would be to state that information was actually given by Dr. Rosenfeld to the witness under this waiver. Would you stipulate that far?

Mr. McGinley: Yes, your Honor, I will stipulate to that.

The Court: That is as far as we can go. The stipulation will be received.

Mr. McGinley: May I address the court? May I ask counsel, so as to obviate further interrogation of this witness, if he would be willing to stipulate to these facts: That the adjuster, Mr. Harris, for the Equitable Life Insurance Company, obtained the authorization which has just been referred to, in connection with the claim of Harry Lutz, in a policy of insurance, in which he was

(Testimony of Howard L. Harris)

named beneficiary, and the Equitable Life Insurance Company was the insurer, and that pursuant to investigation made by this gentleman the policy, the full amount of the policy, was paid?

The Court: You think that over while we take a five minute recess.

(Short recess.)

Mr. Herndon: We would respectfully decline from the proposed stipulation, if your Honor please.

The Court: Very well.

Q. By Mr. Herndon: Mr. Harris, will you state the substance of what was told you by Dr. Rosenfeld on the occasion that you went to his office, as you have previously [20] testified?

Mr. McGinley: If your Honor please, the conversation is objected to, or the substance of the conversation is objected to, upon the ground that it is hearsay, and not binding on the defendant; two, that it calls for the disclosure of information which would be privileged under Sec. 1881 of the Code of Civil Procedure, sub 4; therefore, it is incompetent; and that it affirmatively appears that Dr. Rosenfeld at the time in question was a physician of Harry Lutz, and that he was the patient, and such information as is called for by the question, being information pursuant to a limited waiver as distinguished from a general waiver, is incompetent, under Sec. 1881, subdivision 4.

The Court: The objection will be sustained. It is clearly hearsay. If it is done for the purpose of impeachment, one cannot impeach their own witness; otherwise it would be merely cumulative. There is nothing to show this witness would testify any differently than the witness Dr. Rosenfeld testified.

(Testimony of Howard L. Harris)

Mr. Herndon: It is offered for the sole purpose, your Honor, of proving that the information was communicated; not to prove it is true.

The Court: I understand that has already been admitted by counsel for the defendants.

Mr. Herndon: I thought counsel declined to stipulate.

The Court: No, he admitted it, I understand. [21]

Mr. McGinley: Yes, your Honor, for the purposes stated by the court, I stipulated.

Q. By Mr. Herndon: State whether or not you were shown the records at the Cedars of Lebanon Hospital, which I now show you, being Plaintiff's Exhibit No. 8.

Mr. McGinley: May I urge the same objection, your Honor, and on the further ground that it would be immaterial in view of the stipulation.

The Court: I think it is conceded that he was shown it, by the stipulation. Is that not true?

Mr. McGinley: Yes, your Honor, for the purposes stated.

Mr. Herndon: Then I will withdraw the question. In conferring with my associate, your Honor, the question is in our minds whether the stipulation is broad enough to include the fact that Dr. Rosenfeld did disclose to this witness that he had made certain examinations, and the substance of his declarations. In other words, it is of no avail to us to stipulate that he told him something, unless the stipulation is broad enough to show that the doctor disclosed to the witness matters relating to the health of the insured; that is to say, some of the matters here at least claimed to be privileged.

The Court: It is my understanding of the admission that naturally the doctor did disclose his findings with regard to the patient. What the actual statement was, would be hearsay, is that not correct? [22]

(Testimony of Howard L. Harris)

Mr. McGinley: Yes, your Honor; my basic objection is that anything that Dr. Rosenfeld would say would be hearsay as to Harry Lutz, in this suit.

The Court: That is right.

Mr. Herndon: Very well; if counsel's understanding of the stipulation is that your Honor has indicated, we are satisfied, and counsel may cross examine.

Cross-Examination

Q. By Mr. McGinley: Mr. Harris, how long have you been employed by the Equitable Life Insurance Company? A. Since August 1, 1942.

Q. Since August 1, 1942? Will you please tell us what your duties have been?

A. I am a claim investigator, handling the general checking of disability claims, accident and health claims, investigating on death claims, and working on disappearance cases.

Q. Part of your duties pertain to the investigation of death claims, I understand? A. Yes, sir.

Q. When was the matter of the claim of Abe Lutz referred to your attention?

A. May I refer to my file?

The Court: Anything that you have, any memorandum of what happened at the time of the occurrence, you may refer to it. [23]

A. June 7, 1944, I received the first communication from our home office.

Q. By Mr. McGinley: Pursuant to that communication from your home office did you procure, through the Equitable Life Insurance Company, an authorization from Harry Lutz to investigate the claim made on account of the death of his father?

(Testimony of Howard L. Harris)

A. I never did procure the authorization.

Q. You were handed it by some other person in the organization? A. That's right.

Q. And the document that you were handed was the authorization dated June 7, 1944?

A. I did not understand that.

The Court: The document that you were handed is Exhibit 11? A. Yes, sir.

Q. By Mr. McGinley: Can you refresh your memory from your file, Mr. Harris, and give us the date of the Equitable Life policy, under which Harry Lutz was named beneficiary?

Mr. Herndon: If your Honor please, I object to that upon the ground that it is immaterial, and has no bearing on any issue here. It is beyond the scope of the direct examination, and, therefore, is immaterial.

The Court: It seems to me that that is so. I don't think it would be proper cross examination to go into the [24] policy if it were not within the scope of the direct examination.

Mr. McGinley: The authorization dated June 7, 1944, your Honor, has been admitted subject to the stipulation that is in the record. The stipulation is that it contains the original signature of Harry Lutz. If this witness knows, I want to show the circumstances under which the authorization was obtained.

The Court: He says he didn't get it, so he doesn't know anything about it. As I understand it, you know nothing about the circumstances under which it was obtained? A. That's right.

The Court: That was the reason for the sustaining of the objection.

(Testimony of Howard L. Harris)

Q. By Mr. McGinley: Did you exhibit the original authorization dated June 7, 1944, to Dr. Rosenfeld?

A. I believe, sir, there were three authorizations of this type, the same type of authorization.

Q. Were they all originals, Mr. Harris?

A. Yes, sir.

Q. Did you leave an original authorization with Dr. Rosenfeld? A. Yes, sir.

Q. Was there an original authorization retained in your file? A. No, sir. [25]

Q. What did you do with the other three authorizations?

The Court: The other two?

Q. By Mr. McGinley: The other two; pardon me.

A. One of the other authorizations was presented to Dr. Rosenfeld for countersignature, or confirming signature, and presented to the Cedars of Lebanon Hospital, where it is still on file with the chart, I presume. The third one was presented to the Sansum Clinic, or the Cottage Hospital, Santa Barbara.

Q. On what date did you complete the investigation made for the Equitable Life Insurance Company?

A. My last report is dated August 4, 1944.

Q. And, Mr. Harris, do I summarize fairly the discharge of your duties in connection with this authorization, when I say that everything that you did in connection with the investigation of the health of Abe Lutz, deceased, was done in connection with the claim being made for the proceeds of the policy with the Equitable Life Insurance Company, by which you were employed? A. Yes.

Mr. McGinley: That is all, your Honor.

The Court: Any further questions?

Mr. Herndon: No further questions. [26]

* * * * *

PAUL M. ARNOLD,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Paul M. Arnold.

Direct Examination

Q. By Mr. Herndon: Where do you reside, Mr. Arnold? A. Los Angeles.

Q. What is your business or occupation?

A. Insurance inspector and investigator.

Q. By whom are you employed?

A. The Retail Credit Company.

Q. How long have you been so employed?

A. Since May 1, 1926.

Q. Did you ever have occasion to investigate the case of Abe Lutz? A. Yes, sir, I did.

Q. When was that?

A. It was the last week in June, 1944.

Q. Do you know by whom you were employed to make that investigation? A. Yes, I do.

Q. By whom?

A. The New England Mutual Life Insurance Company of Boston, Massachusetts.

Q. In connection with your investigation, Mr. Arnold, [27] were you given any authorization purporting to bear the signature of Harry Lutz? A. I was.

Q. May I see the exhibit? I will show you exhibit, Plaintiff's Exhibit No. 9, and ask you if that appears to be one of the authorizations that you stated you had?

A. It does.

Q. From whom did you receive that authorization?

A. I did not obtain that myself. As I remember it, that came from our company.

(Testimony of Paul M. Arnold)

Mr. Herndon: May I show this to counsel?

Mr. McGinley: May I show this to Mr. Lutz?

The Court: Surely.

Mr. McGinley: The defendants will stipulate that the signature of Harry Lutz, appearing on the document, dated June blank, 1944, is the signature of Harry Lutz.

Mr. Herndon: I will ask to have the document marked for identification.

The Court: It may be received and so marked.

The Clerk: Defendants' No. 20.

Q. By Mr. Herndon: After the receipt of this authorization, will you state what you did in connection with your investigation?

A. I contacted Dr. Rosenfeld, as the first step, and the Cedars of Lebanon Hospital.

Q. Did you exhibit any authorization to Dr. Rosenfeld [28] in connection with your conference with him?

A. I did.

Q. Did you exhibit one of these authorizations to anyone at the Cedars of Lebanon Hospital?

A. Yes, I did.

Q. I will now show you Plaintiff's Exhibit No. 20 for identification, and ask you whether that appears to be identical with one of the authorizations that you had at the time you made your investigation? A. It does.

Mr. Herndon: At this time, we will offer Plaintiff's Exhibit No. 20 for identification in evidence.

Mr. McGinley: If your Honor please, the defendant objects to the document on the same grounds that were urged in the objection to the document on the testimony of Mr. Harris, and I would be willing to stipulate that the same ruling applies, your Honor.

(Testimony of Paul M. Arnold)

The Court: Very well; the same ruling. It may be received. This is the document that you delivered to Dr. Rosenfeld, and also to the Cedars of Lebanon Hospital?

A. Yes, sir.

The Court: Exhibit 20.

Q. By Mr. Herndon: Do you recall having left one of these authorizations at the Cedars of Lebanon?

A. Yes, sir.

Q. Do you recall whether or not you left your card [29] with the person in charge of the records at the Cedars of Lebanon Hospital?

A. I might have; I don't recall.

Mr. Herndon: I wonder, your Honor, if time might not be saved by entering into the same stipulation with respect to the substance of the conversation between this witness and Dr. Rosenfeld, that was entered into in respect to the witness Harris and his conversation.

The Court: I think we might have the same stipulation. My understanding of the stipulation is that he interviewed Dr. Rosenfeld, and that Dr. Rosenfeld answered his questions with regard to the decedent's health and condition. May it be so stipulated?

Mr. McGinley: So stipulated, your Honor.

The Court: It is my view that you can't go into that, because it is hearsay, and not impeachment.

Mr. Herndon: That is all, your Honor.

(Testimony of Paul M. Arnold)

Cross-Examination

Q. By Mr. McGinley: Mr. Arnold, are you regularly employed by the New England Mutual Life Insurance Company?

A. No, sir, I am not. Our company does work for all the insurance companies.

Q. I presume the first mention that was made to you of an investigation of Abe Lutz was in June, 1944?

A. Yes, sir.

Mr. McGinley: That is all. [30]

* * * * *

Mr. Herndon: If your Honor please, we had expected that the defense case would take most of the afternoon, but we do have one rebuttal witness who is going to be read at 3:00 o'clock. It might be that counsel will stipulate.

The Court: Suppose you talk with him during the recess, and see if you can get a stipulation.

(Short recess.)

Mr. Herndon: If your Honor, please, during the recess I discussed with counsel for the defendants the matter of the deposition of Harold Morgan. It appears that the original has not been filed, or made available, and we have agreed, subject to the approval of the court, that a copy might be received in evidence, subject to our objections and [198] motions to strike, and thereby

(Testimony of Paul M. Arnold)

avoid the necessity of the court reporter transcribing all of it.

The Court: Very well. So permitted. Let it go in as defendants' next in order.

Mr. Herndon: Is that agreeable with counsel?

Mr. McGinley: Yes.

The Clerk: Exhibit P. Is that in evidence?

The Court: It goes in evidence, subject to the motions directed against parts of it.

Mr. Herndon: I have in my hand, your Honor, photostatic copies of two documents, the first being headed: New England Mutual Life Insurance Company, Boston, Massachusetts, general agency contract, made and entered into at Boston, Massachusetts, this 28th day of June, 1938, by and between New England Mutual Life Insurance Company of the City of Boston and Commonwealth of Boston, of the first part, and Rolla R. Hays, Sr., Rolla R. Hays, Jr., and Raymond H. Bradstreet, of Los Angeles, California, doing business under the firm name of Hays & Bradstreet, second parties; and supplementary agreement, dated the 28th day of June, 1938, between the same parties. Counsel has indicated that they will stipulate that the documents to which I have referred constitute the agency contract under which the firm of Hays & Bradstreet is operating, and under which it did operate during all the times material to this action; and that photostatic copies of these two documents may be received with the same force [199] and effect as if

(Testimony of Paul M. Arnold)

they were originals, and that no further foundation need be laid.

The Court: With that stipulation they may be received and marked plaintiff's next in order.

Mr. McGinley: Your Honor, the recital of the agreement is correct, that I make no objection to the fact that the document is not an original, but I do wish to object to the documents described on the ground that they are immaterial, in that limitations of knowledge and actions of the agent, not communicated to the insured, are not binding on the beneficiary, Harry Lutz.

The Court: About the only way that I could determine whether they would be would be to have them in evidence. You can hardly maintain that position unless they are in evidence, for me to determine the matter. They may be received and marked.

The Clerk: Plaintiff's Exhibit No. 29.

Mr. Herndon: The plaintiff rests, if your Honor please, subject to our reserved right to move to strike.

The Court: Yes, that is understood.

(Discussion.)

The Court: Suppose that each of you get your motions ready, and file them by 4:00 o'clock next Tuesday afternoon. That will give you much more time than you would have ordinarily. Then any objections that you have to the motions, will be filed by Thursday by 4:00 o'clock. Then I [200] will let you know when I am

(Testimony of Paul M. Arnold)

going to rule on them, and then will determine whether I am going to have oral or written arguments, or both. Have you gentlemen any choice?

Mr. McGinley: Whatever the wishes of the court are in this matter are satisfactory to me; either oral or written, or no argument. I had this in mind, that both counsel have filed pre-trial memorandums, and I think with possibly few additions our respective positions are covered quite adequately in those memoranda.

The Court: Let us see what develops after these motions are passed upon; then I will let you know. The case will be continued until the further order of the court.

Mr. McGinley: Might I ask this, your Honor, before adjournment, to guide me: Is there any particular form which your Honor would care to direct, as to the motions themselves? Would it be sufficient in regard to filing this document by Tuesday afternoon, if we referred to the page and number in the transcript? Do we have to repeat the grounds?

The Court: No, just refer to the grounds stated, by specifically referring to what you are moving to strike, on page so and so, line so and so to line so and so, the grounds for the motion being indicated at page so and so, line so and so, and then all I have to do is to follow the transcript.

[Endorsed]: Filed Aug. 21, 1945. [201]

[Title of District Court and Cause.]

Hon. Ralph E. Jenney, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, March 27, 1945,
2:00 P. M.

Mr. Herndon: If your Honor please, I wish at this time to read in evidence the deposition of Dr. Harold M. Frost. I don't know whether it would be better to have the objections ruled on as the questions are read, or not.

The Court: I imagine so. You have reserved the objections, haven't you? Where was this taken?

Mr. Herndon: It was taken in Boston on written interrogatories, direct interrogatories prepared by us, and cross interrogatories.

The Court: Suppose you read the question, the objection, and then the answer, in that form.

Mr. Herndon: Very well, your Honor. I wonder if it would be satisfactory if Mr. Anderson would read the deposition? My voice has about failed me.

The Court: Yes.

Mr. McGinley: May I say this, your Honor, in regard to the deposition: The deposition which is about to be read, was taken pursuant to written stipulation, which reserved to the defendants all of the objections which could be made to the testimony of Mr. Frost, if he were personally in court, and called as a witness to testify. Additionally, in order that counsel might overcome the objection as to the form of the question, the stipulation specifically provided the specific objections which were

objected to on [2] the ground of form; it was sort of an unorthodox procedure, but we were willing to do so, as I wanted to accommodate counsel so that there would be no interruption or delay in getting the deposition out.

The Court: Read the question and the objection, and I will rule on it.

DEPOSITION OF HAROLD M. FROST,

produced as a witness for the plaintiff.

(Read by Mr. Anderson.)

(1) Q. Please state your full name, place of residence and age.

A. Harold M. Frost; 25 Hundreds Circle, Wellesley Hills, Massachusetts; age, fifty-six.

(2) Q. Are you trained in any particular profession? A. Yes, in the medical profession.

(3) Q. State generally the nature and extent of your professional training and experience.

A. I graduated from Harvard Medical School in 1915 with the degree of Doctor of Medicine. I was surgical interne at the Massachusetts General Hospital, Boston, Mass., from 1913 to 1915. I was a First Lieutenant (honorary) in the Royal Army Medical Corps, stationed at No. 22 General Hospital, British Expeditionary Force, France, July to September, 1915. I was assistant surgeon and chief assistant surgeon at the American Women's War Hospital, [3] Paignton, England, October, 1915, to February, 1918. I was chief surgeon of said hospital from March to August, 1918. I was assistant surgeon. U. S. Troops, Winchester Area, England, September to November, 1918. I was commanding officer, U. S. Camp Hospital No. 35, Winchester England, from November, 1918, to February, 1919. I was

(Deposition of Harold M. Frost)

discharged from the U. S. Army March 1, 1919. I was assistant superintendent of the Massachusetts Eye and Ear Infirmary, Boston, Mass., from May, 1919, to October, 1921. I was engaged in the private practice of surgery in Boston, Massachusetts, from November, 1921, to 1928. I was assistant surgeon to outpatients in the Massachusetts General Hospital, Boston, Mass., 1921 to 1928. I am at present assistant in surgery to outpatients, Massachusetts General Hospital, Boston, Mass.

(4) Q. By whom and in what capacity are you employed?

A. I am employed by the New England Mutual Life Insurance Company in the capacity of Medical Director.

(5) Q. How long have you been employed in the capacity stated in your answer to the preceding interrogatory?

A. I have been so employed since February, 1931.

(6) Q. In what capacity were you employed by New England Mutual Life Insurance Company of Boston during the months of October, November and December of 1942?

A. In the capacity of Medical Director.

(7) Q. Please state fully what your duties were in [4] connection with your employment by New England Mutual Life Insurance Company of Boston during the months of October, November and December of 1942.

A. My duties fell into three main categories. First, I was directly and entirely responsible for such a medical selection of applicants for life insurance as would assure a satisfactory mortality among the policyholders of my company. I was directly responsible for the formulation

(Deposition of Harold M. Frost)

of the rules as to the acceptance of applicants with respect to medical history and condition of health, and for a strict adherence to such rules. It was my direct responsibility to make sure that all applications, from the medical point of view, were reviewed and acted upon by persons properly trained and fully acquainted with the rules of medical selection which I had formulated.

Secondly, I was wholly responsible for the organization and direction of the Medical Department at the Home Office of the New England Mutual Life Insurance Company, this department comprising three medical directors and some fifty clerks. The activities of this department comprised in general the handling of applications, their proper review and the proper action upon them, the correspondence with agents and medical examiners in the field, and the payment of fees for medical examinations.

Finally, I was directly and entirely responsible for the selection and maintenance of an adequate corps of some [5] five thousand medical examiners in the thirty-eight states in which my company operates.

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the answer beginning with the word "I" and concluding with the word "operates" on the following grounds:—"I" to which I refer is the first occurrence, appearing in the statement "First, I was directly and entirely responsible".

The Court: In the very beginning?

Mr. McGinley: That's right, your Honor. The objection, your Honor, is on this ground: First, that the recitation in narrative form by the witness Frost of matters which he was "directly and entirely responsible for" is not responsive to the question, nor is it a statement of

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fact, but is a conclusion of the witness. Each narration of matters which he purports to assign as a division of duties comes within the expression "I was directly and entirely responsible", and then he enumerates what he was directly and entirely responsible for.

The Court: The objection will be overruled. You have objected to that first sentence?

Mr. McGinley: Your Honor, I had objected to all of the answer of paragraph 7, beginning with the expression "First, I was directly and entirely responsible" clear through to the end of the answer terminating with the word "operates". [6]

The Court: In other words, to state it the other way, you object to everything except the first sentence?

Mr. McGinley: Yes, your Honor.

The Court: The objection will be overruled.

(8) Q. What have been your duties in connection with your employment by said company from December, 1942, to the present date?

A. My duties have been the same as outlined in my reply to previous Interrogatory No. 7.

(9) State fully the nature and extent of your training and experience in connection with the underwriting, acceptance and rejection of life insurance risks.

A. I was appointed Home Office Medical Examiner of the New England Mutual Life Insurance Company in November, 1921, and as a part of my duties then began to review and pass upon applications under the guidance and instruction of Dr. Edwin W. Dwight, then the Medical Director.

In 1924 I was appointed part time Assistant Medical Director of said company, my time then being given fully to the review and medical action on applications.

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In 1928 I was appointed Associate Medical Director of said company on a full time basis.

In 1931 I was appointed Medical Director of said company, having remained in this capacity to the present.

In 1924 I became a member of the Association of Life Insurance Medical Directors of America, and have remained a [7] member to the present. For two years I was the editor of the Proceedings of said Association. For two years I was vice-president of said Association. For one year I was president of said Association. For the last four years I have been a member of the executive council of said Association. I have therefore become fully familiar with the publications of said Association, which deal exclusively with the underwriting, acceptance and rejection of life insurance risks.

I have become familiar with the publications of the Actuarial Society of America, which to a considerable extent deal with the underwriting, acceptance and rejection of life insurance risks.

By study I have become familiar with the published articles of numerous investigations carried out by these two organizations, dealing with the effect upon longevity of medical and physical impairments.

By study I have become familiar with the publications of the Medical Section of the American Life Convention, which deal exclusively with the underwriting, acceptance and rejection of life insurance risks.

Furthermore, I have had twenty years of extensive personal contact and correspondence with numerous medical directors of other life insurance companies dealing with the underwriting, acceptance and rejection of life insurance risks. [8]

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Finally I have been intimately connected with the investigation of the mortality results of the New England Mutual Life Insurance Company for the last twenty years.

(10) Q. Are you familiar with the practices and usages of life insurance companies generally with respect to underwriting, acceptance and rejection of life insurance risks as such general practices and usages existed during the months of October, November and December of 1942? A. Yes.

(11) Q. State fully the sources of your knowledge concerning the usages and practices of life insurance companies generally with respect to the underwriting, acceptance and rejection of life insurance risks.

A. In answer I refer to my reply to Interrogatory No. 9.

(12) Q. Did New England Mutual Life Insurance Company of Boston, during the months of October, November and December of 1942, follow and adhere to the then prevailing usages and practices of life insurance companies generally with respects to the acceptance and rejection of applications for policies of life insurance?

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to question No. 12 on the following grounds, first: There has been no foundation laid for the question, in that the witness has not been shown to be a [9] person qualified to express an opinion on the matter inquired into; and, 2. On the ground that the question calls for hearsay in that the interrogatory requires the witness to give an opinion as to what some other person knew, to-wit: the New England Mutual Life Insurance Company; and, 3. Foundational support is

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not shown in the qualifications, in that it does not appear that this witness is the only one employed by the New England Mutual Life Insurance Company of Boston who would have the capacity to give an affirmative or negative answer to the interrogatory.

The Court: The objection will be overruled. I think the objection goes to the weight to be given to the answer, and not to its admissibility. A. Yes.

(13) Q. Was any standard and uniform procedure followed by New England Mutual Life Insurance Company of Boston during the months of October, November and December of 1942 in passing upon applications for policies of life insurance?

Mr. McGinley: The defendants urge the same objection stated to the last question, your Honor.

The Court: The same ruling. A. Yes.

(14) Q. If your answer to the preceding interrogatory was in the affirmative, describe the procedure followed.

A. Incoming applications for life insurance were received in the Control Department, and any miscellaneous [10] information which may have been received prior to the arrival of applications was attached to the appropriate applications in this department. The applications were then forwarded to the Medical Department for the attachment of any confidential information which might be in the files of the Medical Department. The applications were then forwarded to the Underwriting Department, where they were reviewed by lay underwriters. These lay underwriters are authorized to act upon applications for amounts of less than \$10,000, and

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if in addition the amount of the application added to the amount of the insurance already in force in this company does not exceed \$25,000. These lay underwriters reviewed the application both from the medical angle, with respect to the medical history and condition of health, and from the nonmedical angle, with respect to such items as habits, morals, occupational hazard, and so forth. So far as concerns their review of medical history and condition of health, they were directly responsible to me in my capacity of Medical Director, to act in accordance with definite rules formulated by me in my capacity as Medical Director.

If the information in applications with respect to medical history and condition of health did not conform to the rules which I had formulated, such applications were then forwarded to the Medical Department. Likewise, if the amount of insurance applied for in such applications [11] exceeded the limits cited above, such applications were also forwarded to the Medical Department.

All applications referred to the Medical Department were reviewed and acted upon by one of the medical directors, who either approved the application, declined it, or, if he considered the issue of substandard insurance justifiable, referred said applications to the Underwriter of our reinsuring company to determine the appropriate ratings, a specialty in which this Underwriter has been trained.

Applications which were approved were referred back to the Underwriting Department for final review there with respect to the nonmedical items cited above. When applications thus submitted were finally approved in the

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Underwriting Department, such applications were then forwarded to the Policy Department. In said department the policy was written. In addition Parts I and II of the application were there photostated and the photostats of the Parts I and II were there attached to the appropriate policies. The policies were then mailed out to the appropriate agencies.

(15) Q. Was the procedure which you have described in your answer to the preceding interrogatory in accordance with the then prevailing usages and practices of insurance companies generally in acting upon applications for policies of life insurance? [12]

Mr. McGinley: The defendants urge the same objection as stated to No. 12.

The Court: Same ruling, as to the weight to be given on the foundation laid. He has indicated what his experience was; apparently he was familiar with these matters.

A. Yes.

(16) Q. Attached to these interrogatories is a photostatic copy of the original application for policy number 1,172,844, consisting of two parts, each of which bears a signature reading "ABE LUTZ". Take up and examine this application and state whether you have previously seen the original thereof.

A. I have previously seen the original application, Policy No. 1,172,844.

(17) Q. Please hand the photostatic copy of the application just identified to the notary public and request that the same be marked "Plaintiff's Exhibit No. 1" for identification and that it be attached to your deposition.

A. I hand the Notary a photostatic copy of said application and request that the same be marked "Plaintiff's

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Exhibit No. 1" for identification and that it be attached to my deposition.

(Photostatic copy of application of Abe Lutz is marked as Plaintiff's Exhibit 1 for identification.)

(18) Q. Will you please state when and where you first [13] saw the application, photostatic copy of which you have previously identified and which has been marked by the notary public as "Plaintiff's Exhibit No. 1" for identification?

A. I first saw said application on November 20, 1942, in my office at the Home Office of the New England Mutual Life Insurance Company at 501 Boylston Street, Boston, Massachusetts.

(19) Q. What action, if any, was taken by you with respect to this application for policy of insurance number 1,172,844?

A. I approved said application for policy of insurance No. 1,172,844 in my capacity of Medical Director. I was the sole official charged with full responsibility for passing upon said application in so far as the medical aspects were concerned. In the process of said approval I reviewed the information given in the application and in all other correspondence and papers attached to the file. Having satisfied myself that medical approval was justified, I then stamped the work sheet in connection with said application as follows: "Cleared, Medical Dept., Nov. 27, 1942, Medical Director, \$13,000 retention only standard," and signed "H. Frost."

I hand the Notary said work sheet and request that the same be marked "Plaintiff's Exhibit 1a" for identification and that it be attached to my deposition. [14]

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I also had a letter from the Equitable Life Assurance Society of the United States dated November 25, 1942, signed by Robert M. Daley, M. D., the Medical Director of said company.

I hand said letter to the Notary and request that the same be marked "Plaintiff's Exhibit No. 4" for identification, and that it be attached to my deposition.

(Letter dated November 25, 1942, signed by Robert M. Daley, M. D., Medical Directors, is marked as Plaintiff's Exhibit 4 for identification.)

(26) Q. In approving said application for said policy, did you rely upon the information contained in the application, photostatic copy of which has been marked "Plaintiff's Exhibit No. 1" for identification? A. Yes.

(27) Q. Did New England Mutual Life Insurance Company of Boston rely upon the information contained in the application identified as "Plaintiff's Exhibit No. 1" in the issuing by it of policy number 1,172,844?

Mr. McGinley: That question is objected to upon the same ground as to No. 12. [17]

The Court: Objection sustained. It calls for the conclusion of the witness. 26 is "In approving said application did you rely upon the information contained"; the background comes from the other question. The difficulty with this type of question is it is conceivable there might be ten other men who had a finger in the pie which does not appear; therefore, I think the objection must be sustained to that particular question. A. Yes.

(28) Q. Your attention is directed to Part II of the document entitled "APPLICATION TO THE NEW ENGLAND MUTUAL LIFE INSURANCE COM-

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PANY OF BOSTON", identified as "Plaintiff's Exhibit No. 1", and particularly to the questions numbered 35 A, 35 E, 35 H, 36 and 44, and to the answers to said questions written in ink. At the time you approved the application for policy number 1,172,844, did you have any information or knowledge concerning the matters referred to in said questions other than that given by the answers to said question?

A. Yes. I had the information contained in the letter cited by me in reply to Interrogatory 25, Plaintiff's Exhibit No. 4. This information was that Mr. Lutz had consulted Dr. Maurice Rosenfeld and Dr. Henry Lissner, and that Dr. Lissner had forwarded to the Equitable Life Assurance Society a certificate on September 3, 1942, stating that on August 11, 1942, a blood sugar test showed [18] 111 mgm per 100 cc. This was the only information I had concerning the matters referred to in said questions, other than that given in the answers to said questions.

(29) Q. In approving said application, did you rely upon the answers to any of the questions numbered 35 A, 35 E, 35 H, 36 and 44, as contained in said application?

A. Yes.

(30) Q. If your answer to the last preceding interrogatory was in the affirmative, state which of the answers to said questions as contained in said application were relied upon by you.

A. I relied upon the following answers to said questions:

35a, that Mr. Lutz had never suffered from indigestion;

35e, that Mr. Lutz had never suffered from dizziness or fainting spells;

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35h, that Mr. Lutz had never suffered from pain or pressure in the chest;

36 and 44, that Mr. Lutz had consulted Dr. Rosenfeld on only one occasion during the previous five years, namely, in August, 1942, and for the sole purpose of having a physical examination and a blood sugar determination, the report of which was normal.

(31) Q. Assume the existence of the following facts: That on January 16, 1937, a person proposed for insurance in an application for the issuance of a policy of life insurance [19] had consulted a physician, complaining of dizziness with nausea; that on June 1, 1942, the proposed insured consulted the same physician, complaining of pain in the chest, and that on the last mentioned date, after examining the insured and taking an electrocardiogram, the physician prescribed nitroglycerine; that in July of 1942, the proposed insured was again examined by the same physician, and that, as a part of the last mentioned examination, an electrocardiogram was taken; and that the application for a policy of insurance upon the life of said proposed insured was acted upon during the month of November, 1942, by a life insurance company, which followed the practices and usages then prevailing among life insurance companies generally with respect to the underwriting acceptance and rejection of life insurance risks. Are you able to say, from your knowledge of the practices and usages among life insurance companies generally as prevailing during the year 1942, whether information of the facts recited in this interrogatory concerning the medical history of the proposed insured would have enhanced the premium to be charged or would have lead to a rejection of the risk?

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Mr. McGinley: That question, your Honor, being interrogatory No. 31, is objected to upon the following grounds: First, that the question, being hypothetical, assumes facts not in evidence at this stage of the proceeding, and which have heretofore been objected to on various [20] grounds, including the question of privilege and hearsay, in so far as Harry Lutz, the counterclaimant, is concerned.

Secondly—

The Court: Let us take them one at a time. Just repeat again that objection.

Mr. McGinley: The defendant and counterclaimant object to interrogatory No. 31 upon the following grounds: 1. That interrogatory No. 31, being a hypothetical question, assumes, for the purpose of the question, facts which are not in evidence, and which have not been proven, in that the information recited as the basis for the hypothesis, as heretofore being objected to, and being a disclosure of information privileged under Section 1881, sub 4, of the Code of Civil Procedure of the State of California, and on the additional ground—

The Court: One at a time. That ends your first objection. Let me see if I understand you. As I understand it, you concede that this man is being examined as an insurance expert, medical expert. Your point is that the hypothetical question contains elements not present in the record, and also is predicated upon other elements which on your theory, were inadmissible because of the fact that the facts deduced were privileged communications under Sec. 1881, sub 4, Code of Civil Procedure, am I correct?

Mr. McGinley: That's my first ground, your Honor.

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The Court: I think that is not sound, particularly at [21] this time, as to the first part, because a hypothetical question, under our practice in the federal court, and even in the California State court, although I think the practice is not quite so liberal, does not need to contain all of the elements. It may be admitted for what it is worth. If a man happens to leave out an important element he has to sink or swim by his question. If an element is left out the answer does not mean very much. It may mean very little. Therefore, it is a question of the weight to be given to it. As to the other part, I will have to accept the answer subject to a motion to strike, predicated upon my final ruling upon the question of privilege so your record is made.

Mr. McGinley: The second ground is this: That the facts which serve as the basis of the hypothet constitutes hearsay in so far as Harry Lutz is concerned, and, therefore, being inadmissible as evidence against Harry Lutz, are not competent as part of the hypothetical question.

(Discussion.)

Mr. McGinley: Now, the purpose of preserving my record on the second ground is this, your Honor: If your Honor holds that entirely aside from the question of privilege my objection that the statements of Dr. Rosenfeld as to the history of Abe Lutz is hearsay, and not binding, then there would be no basis for the facts that are recited in the hypothetical question. [22]

The Court: Let me see if I understand you; your objection to the question is that it contains as a part thereof certain elements, the proof of which is inadmissible, as founded on inadmissible hearsay, and therefore the question should fall?

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Mr. McGinley: That is stated accurately, your Honor.

The Court: I think we will have to accept that temporarily, subject to a motion to strike, predicated upon my ruling upon your objections to hearsay.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., Wednesday, March 28, 1945.) [23]

Los Angeles, California, Wednesday, March 28, 1945,
10 A. M.

The Court: I think in connection with this question and objection, that in order to make a sound objection you should specify what particular element in the question you claim is hearsay.

Mr. McGinley: If your Honor please, the defendant objects to the following statement appearing in the questions on the ground that they are hearsay.

The Court: In what questions?

Mr. McGinley: Question 31.

The Court: In the singular.

Mr. McGinley: 1. "That on January 16, 1937, a person proposed for insurance in an application for the issuance of a policy of life insurance had consulted a physician, complaining of dizziness and nausea; that on June 1, 1942, the proposed insured consulted the same physician, complaining of pain in the chest, and that on the last-mentioned date, after examining the insured and taking an electro-cardiogram, the physician prescribed nitroglycerine; that in July of 1942, the proposed insured was again examined by the same physician, and that, as a part of the last-mentioned examination, an electrocardiogram was taken."

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Those statements, your Honor, are objected to by the defendant on the ground that they are hearsay.

The Court: It seems to me that you are going to [24] require a transcript here in order for you properly to make your motions to strike, because under our rules a motion to strike must be specific. You said you had still another objection, I believe?

Mr. McGinley: Yes, your Honor, I also object upon the ground that the proper foundation has not been laid to qualify the witness, Mr. Frost, to give an opinion on whether or not the conditions and statements assumed in the hypothetical question would have enhanced the premium. Additionally, there is no foundation by reason of any facts disclosed to the insurance company anything other than a nominal premium was charged.

The Court: I will take the matter, subject to a motion to strike. The answer may be read.

A. Yes, it would have led to an outright immediate rejection of the risk.

(32) Q. Assuming a disclosure of the facts concerning the medical history of the proposed insured as recited in the preceding interrogatory, what action would have been taken by an insurer following the usages and practices of insurance companies generally as such usages and practices prevailed during the year 1942?

Mr. McGinley: May it be understood that the same objection last urged, on the same grounds, may be considered as having been urged to this question?

The Court: The same ruling. [25]

A. The insurer would have rejected the application immediately and without further investigation.

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(33) Q. Are you able to say, from your knowledge of the practices and usages among life insurance companies generally, as prevailing during the months of November and December of 1942, whether information to the effect that a proposed insured had suffered pain in the chest and, within six months prior to the date of the application for life insurance, had submitted to a physical examination, including the taking of an electrocardiogram, and that after such an examination, the examining physician had prescribed nitroglycerine, would have led to a rejection of the proposed risk, or whether it would have led the proposed insurer to have sought additional information?

Mr. McGinley: If your Honor please, may it be stipulated that the same objection urged in regard to interrogatory No. 1, with the specification of the testimony as hearsay, may be considered as having been made to interrogatory 33?

The Court: It may be so stipulated.

Mr. Herndon: So stipulated.

The Court: The same ruling.

A. Most companies would have rejected the proposed risk immediately and without further investigation. A few companies might have requested statements from the attending physicians in order to obtain firsthand information. [26]

(34) Q. If, in your answer to the preceding interrogatory, you have stated that such information would have led the insurer to seek additional information, and if, as a result of further inquiries, it had been disclosed that approximately six years prior to the date of the application, the proposed insured had consulted a heart

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specialist, complaining that he had suffered from dizziness and nausea, and that upon examination made on the last mentioned date, the examining physician had made a tentative diagnosis of cerebral arteriosclerosis, and that on June 1, 1942, the proposed insured had consulted the same physician, complaining of chest pain, and that on the last mentioned date an examination of the proposed insured was made by the physician, including the taking of an electrocardiogram, and that said physician, upon the basis of said examination, had made a tentative diagnosis of mild angina pectoris and had prescribed the taking of nitroglycerine by the proposed insured, are you able to say, from your knowledge of the practices and usages among life insurance companies generally, as prevailing during November and December of 1942, whether information of the facts just recited would have led to a rejection of the risk?

Mrs. McGinley: May it be stipulated, your Honor, that the same objection as was made to interrogatory No. 31 may be stipulated as having been urged to the last interrogatory? [27]

The Court: May it be so stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling. A. Yes.

(35) Q. If your answer to the last preceding interrogatory was in the affirmative, state whether the information recited in said last interrogatory would have lead to a rejection of the proposed risk.

Mr. McGinley: May it be stipulated, your Honor, that the same objection as to interrogatory No. 31 may have been considered as to this?

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The Court: May it be so stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

A. Yes, to an outright rejection of the proposed risk.

(36) Q. From your knowledge of the practices and usages among life insurance companies generally, as such practices and usages existed during the year 1942, please state whether a medical history of a proposed insured, indicating that within a period of one year prior to the date of an application for life insurance the proposed insured had complained of pain in the chest and had submitted to physical examinations, including the taking of electrocardiograms, and that the proposed insured had taken nitroglycerine pursuant to prescription given by a physician after examination which [28] included the taking of an electrocardiogram, would be deemed material to a decision by the proposed insurer as to whether the risk should be accepted or rejected.

Mr. McGinley: May it be stipulated, your Honor, that the same objection which was urged to interrogatory No. 31 may stand against interrogatory No. 36?

The Court: May it be stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

Mr. McGinley: And the additional objection, your Honor, that the question calls for a conclusion in that it calls for the opinion of someone other than the witness, to wit, the proposed insurer.

The Court: I think that objection is sound. He is not being asked what his recommendation as a medical officer would be, to the company. He is being asked

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what the company would do, and the company might not follow his advice.

Mr. Herndon: Yes, I think it is reasonably debatable, your Honor. I would submit, however, that the question calls for an answer based on general usage and practice. Fairly interpreted undoubtedly the question has that meaning, but we will submit to your Honor's ruling, particularly in view of the fact that we don't deem the question and answer indispensable.

The Court: It seems to me that the material [29] elements are covered elsewhere. I am not sure that you interpret this question to mean substantially this: What, from your experience as a medical officer, is indicated by your answers to the questions, would be the custom and practice of an insurer under those circumstances? I am inclined to think that the question is unfortunately worded. I will sustain the objection. I might possibly change my mind before the close of the case, but I think that objection is sound. It is to the additional objection that I am sustaining it.

(37) Q. If, at the time said application for policy number 1,172,844 was approved by you, you had known that the said Abe Lutz had consulted a physician on June 1, 1942, complaining of pain in the chest, and that the physician, after the examination of the said Abe Lutz, including the taking of an electrocardiogram, had prescribed nitroglycerine, and that the said Abe Lutz had again consulted the same physician in July of 1942, and that on the last mentioned date an electrocardiogram had been taken, what action would have been taken by you in your capacity as an employee of New England Mutual

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Life Insurance Company of Boston with reference to said application?

Mr. McGinley: May it be stipulated, your Honor, that the same objection as was urged to interrogatory No. 31 may stand as to interrogatory 37? [30]

The Court: So stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

A. In my capacity as an employee and Medical Director of the New England Mutual Life Insurance Company I would have rejected the application without further investigation.

(38) Q. If, at the time said application for policy number 1,172,844 was approved by you, you had known that said Abe Lutz had suffered pain in the chest for a period of approximately one year, and that within a period of six months prior to the date of said application, said Abe Lutz had consulted a physician and had submitted to two examinations involving the taking of electrocardiograms, what action would have been taken by you in your capacity as an employee of New England Mutual Life Insurance Company of Boston with reference to said application?

Mr. McGinley: May it be stipulated, your Honor, that the same objection stated as to interrogatory No. 31 may stand as against interrogatory No. 38?

Mr. Herndon: Your Honor, I have a little apprehension about that question—the elements that it should obtain for one year. In fairness to the court, I have a question mark on that. I am not sure.

The Court: There was a question in my mind when you read that. I don't believe the evidence is clear. The [31] question is not one hundred per cent clear.

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Mr. Herndon: May the plaintiff withdraw that question, your Honor?

The Court: Yes.

(39) Q. In approving the application for policy of insurance number 1,172,844, did you, in your capacity as an employee of New England Mutual Life Insurance Company of Boston, consider the answers to questions 35 E, 35 H 36 and 44 of the application material to the risk insured against?

A. Yes, most certainly.

(40) Q. On what date did you approve the application for policy of insurance number 1,172,844?

A. I approved said application for policy of insurance No. 1,172,844 on November 27, 1942.

(41) Q. On what date was policy of insurance number 1,172,844 issued by New England Mutual Life Insurance Company of Boston?

A. Said policy of insurance No. 1,172,844 was issued by the New England Mutual Life Insurance Company on December 1, 1942.

(42) Q. At what place was said policy number 1,172,844 approved and issued?

A. Said policy No. 1,172,844 was approved and issued at the Home Office of the New England Mutual Life Insurance Company at 501 Boylston Street, Boston, Mass. [32]

The Court: I just have a thought; why wouldn't it save this reporter a lot of trouble, and would not hurt us any in going over these interrogatories, to just put in these interrogatories which were objected to, and then simply say: Interrogatory so and so read, objection so and so, and ruling of the court. Where there is no

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objection there is no need of having anything in there.

Mr. Herndon: That would be satisfactory to the plaintiff.

Mr. McGinley: So stipulated.

The Court: The stipulation will be received.

(43) Q. What was done with said policy after it was issued?

A. Said policy No. 1,172,844 was mailed on December 2, 1942, from the Home Office of the New England Mutual Life Insurance Company, to our general agents, Messrs. Hays & Bradstreet at 609 South Grand Avenue, Los Angeles, California.

(44) Q. If you have stated in your answer to the preceding interrogatory that said policy was sent by mail from the home office of New England Mutual Life Insurance Company of Boston to Los Angeles, California, please state to whom said policy was sent and the date of its mailing.

A. In answer I refer to my reply to previous Interrogatory No. 43.

(45) Q. Please state the provisions of the established [33] rule or rules, if any, of New England Mutual Life Insurance Company of Boston, effective during November and December of 1942, governing the acceptance or rejection of a life insurance risk in a case wherein the medical history of the proposed insured would show such matters as the following: That the proposed insured had suffered from pain in the chest within a year prior to the date of the application for the insurance, and that within the same period the proposed insured had submitted to three physical examinations which included the taking of electrocardiograms; that as a result of such

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examinations, the examining physician had made a tentative diagnosis of mild angina pectoris and had prescribed the taking of nitroglycerine.

Mr. McGinley: May it be stipulated, your Honor, that the objections urged with regard to interrogatory No. 31 may be considered as having been stated in opposition to interrogatory No. 45?

The Court: May it be so stipulated?

Mr. Herndon: So stipulated.

The Court: This is the first time that a hypothetical question has referred to the established rules of the New England Mutual Life. I don't think that question would be sound; I think it would be objectionable, unless it is saved by the prior question and answer that the usages and customs in the New England Life were the usages and customs of other insurance companies. With that connecting [34] link and that understanding, it will be the same ruling.

A. The provisions of the established rules of the New England Mutual Life Insurance Company were that the life insurance risk would be rejected outright and immediately without further investigation.

Mr. McGinley: If your Honor please, in regard to the answer, the defendants move to strike it upon the ground, first, that it is not responsive, and, secondly, it is the interpretation of the witness as to what the provisions of the rules of the New England Mutual Life disclose rather than any statement of the provisions of the established rules of the New England Mutual Life Insurance Company.

The Court: The same ruling.

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(46) Q. Based upon your knowledge of the usages and practices among life insurance companies generally, as prevailing in November and December of 1942, state whether disclosure of a medical history of a proposed insured would have led to a rejection of the proposed risk if such medical history had disclosed the following matters: That the proposed insured had consulted a physician approximately six years prior to the date of the application for insurance, complaining of dizziness with nausea, and that after examination, the physician made a tentative diagnosis of slight cerebral arteriosclerosis, and that within a period of one year prior to the date of the application, the proposed insured had consulted a physician, complaining of pains in the chest, and that after examination and the taking [35] of an electrocardiogram, the physician had made a tentative diagnosis of mild angina pectoris.

Mr. McGinley: If your Honor please, may it be stipulated that the same objection urged to interrogatory No. 31 may stand to interrogatory 46?

The Court: It may be so stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

A. The history set forth in this interrogatory of a proposed insured would have led to an immediate outright rejection without further investigation.

(47) Q. Subsequent to the issuance of policy number 1,172,844, did New England Mutual Life Insurance Company of Boston receive any information concerning the health or medical history of Abe Lutz, the insured under said policy number 1,172,844, which was not in-

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cluded or contained in either the application identified as "Plaintiff's Exhibit No. 1" or in the report of the medical examiner identified as "Plaintiff's Exhibit No. 2"?

A. Yes.

(48) Q. If your answer to interrogatory number 47 was in the affirmative, please state when the New England Mutual Life Insurance Company of Boston received any information concerning the health or medical history of said Abe Lutz which was not contained in either the application or in the report of medical examiner which have been identified as "Plaintiff's Exhibits Nos. 1 and 2".

A. On December 14, 1942, and on December 29, 1942. [36]

(49) Q. What was the information received by New England Mutual Life Insurance Company of Boston to which you have referred in your answer to interrogatory number 48?

A. On December 14, 1942, said company received a photostat of an Attending Physician's Statement, said to have been submitted by Dr. M. H. Rosenfeld to the Medical Director of the Equitable Life Assurance Society of the United States, which contained no signatures on it, revealed nothing except the indication that at the request of Abe Lutz the following information was submitted, namely, "Blood sugar determination 115 mill."

I refer to Defendants' and Counterclaimants' Exhibit No. 2, marked "Defts. & Counterclaimant's Ex. 2 for Iden., 3-2-45, W. H. Davis, Notary Public," a copy of which I hand to the Notary and ask that it be attached to this deposition.

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(Photostatic copy of Attending Physician's Statement, marked "Defts. & Counterclaimant's Ex. 2 for Iden., 3-2-45, W. H. Davis, Notary Public," is attached hereto.)

On December 29, 1942, said company received information that when an application on the life of Abe Lutz was submitted to the Equitable Life Assurance Society of the United States, this company asked him for a blood sugar test; that before doing so Mr. Lutz went to Dr. Rosenfeld to have this test made and to see if he was all right; that there were no symptoms, that the findings were negative, that no treatment or advice was given, and that the results were [37] satisfactory.

(50) Q. From what source and in what manner did you receive the information which you have stated in your answer to interrogatory number 49?

A. The photostat of the Attending Physician's Statement referred to by me in reply to previous Interrogatory No. 49 as having been received by said company on December 14, 1942, came from Mr. Harold P. Morgan of the Hays & Bradstreet agency in Los Angeles. It was submitted with an explanatory letter from Mr. Morgan dated December 8, 1942, addressed to Mr. Doane Arnold, Manager, Underwriting Department, New England Mutual Life Insurance Company, 501 Boylston Street, Boston, Mass.

I hand to the Notary said letter and request that it be marked "Plaintiff's Exhibit No. 5" for identification and that it be attached to my deposition.

(Letter dated December 8, 1942, from Harold P. Morgan to Doane Arnold, is marked as Plaintiff's Exhibit 5 for identification.)

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The information cited in my reply to previous Interrogatory No. 49 as having been received by said company on December 29, 1942, came from Mr. Harold P. Morgan in a letter written by him and addressed to me, dated December 24, 1942.

I hand said letter to the Notary and request that it be marked "Plaintiff's Exhibit No. 6" for identification, [38] and that it be attached to my deposition.

(Letter dated December 24, 1942, from Harold P. Morgan to Dr. Harold M. Frost, is marked as Plaintiff's Exhibit 6 for identification.)

(51) Q. When policy number 1,172,844 was issued, was a copy of the application, copy of which has been identified as "Plaintiff's Exhibit No. 1", attached thereto?

A. Yes.

Mr. Herndon: Your Honor, it might be well if Mr. McGinley read the cross interrogatories and answers, since they are prepared by him.

The Court: Where are the exhibits to the deposition? They don't seem to be here.

Mr. Herndon: We assumed, your Honor, that they were in the same folder with the original deposition.

The Court: It says here, memorandum with exhibits attached to the deposition of Dr. Frost. May it be deemed that they are attached to the deposition?

Mr. Herndon: So stipulated.

Mr. McGinley: So stipulated.

The Court: The clerk will see that they are attached under the same cover, so that they will be all together there. [39]

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Cross-Interrogatories

(Read Mr. McGinley.)

(1) Q. Attached to these cross-interrogatories is a photostatic copy of a letter dated November 16, 1942, from Harold P. Morgan to Mr. Doane Arnold. Please examine this letter and state whether you have previously seen the original or a copy thereof. A. Yes.

(2) Q. Please hand the photostatic copy of the letter just identified to the Notary Public and request that the same be marked Defendants' Exhibit No. 1 for identification, and that it be attached to your deposition.

A. I hand the photostatic copy of the letter just identified to the Notary Public and request that the same be marked "Defendants' Exhibit No. 1" for identification and that it be attached to my deposition.

(Photostatic copy of letter dated November 16, 1942, from Harold P. Morgan to Doane Arnold is marked as Defendants' Exhibit 1 for identification.)

(3) Q. Directing your attention to the photostatic copy of the letter just identified Defendants' Exhibit 1 for identification, and particularly that language reading as follows:

"Part of this business is going to be given to the New England Mutual, and as I understand it, there is some history, and as a consequence, the Local Office of the Equitable wired their Home Office to turn all papers over to the New [40] England Mutual, and in a wire just received the Equitable stated they would be glad to do so, but would prefer that our Home Office make this request of the Home Office of the Equitable. Would you therefore be kind enough to get in touch with them

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for the necessary papers, and in the meantime we shall hope to forward an examination on our blank completed by their Chief Examiner here, Dr. Waste." will you please state whether the Medical Department of New England Mutual Life Insurance Company of Boston received any papers from the Equitable Life Assurance Company concerning the history of Abe Lutz for insurance?

A. On receipt of said letter Mr. Arnold, Manager of the Underwriting Department, wired the Equitable Life Assurance Society for copies of the papers of that company. In response to this wire the Medical Director of the Equitable wrote to me stating that he could not forward photostats of the papers as it was contrary to his company's policy. The Medical Department of New England Mutual Life Insurance Company received a letter from the Equitable addressed to me, but no other papers.

(4) Q. If your answer to cross-interrogatory No. 3 is in the affirmative, please hand the communication or communications from the Equitable Life Assurance Company to the Notary Public and request that the same be marked as a group and designated Defendants' Exhibit No. 2 for identification and also request that they be attached to your deposition. [41]

A. I hand to the Notary a copy of the telegram cited in my reply to previous cross-interrogatory No. 3 and request that it be marked "Defendants' Exhibit No. 3" for identification and that it be attached to my deposition.

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(Copy of telegram dated November 19, 1942, from New England Mutual Life Insurance Company to Equitable Life Assurance Society is marked as Defendants' Exhibit 3 for identification.)

With reference to the letter written by the Medical Director of the Equitable to me, as cited in my reply to previous Cross-Interrogatory No. 3, I refer to Plaintiff's Exhibit No. 4.

(5) Q. Please state whether you had any correspondence with the Equitable Life Assurance Company during the months of November and December, 1942, relative to Abe Lutz, or the application of Abe Lutz for insurance either in the Equitable Life Assurance Company, or in the New England Mutual Life Insurance Company of Boston.

A. Yes.

(6) Q. If your answer to cross-interrogatory No. 5 is in the affirmative, please hand the copy or copies of such communications to the Notary Public and request that the same be marked as a group as Defendants' Exhibit No. 3 for identification.

A. In answer to this Cross-Interrogatory I refer to Plaintiff's Exhibit No. 4, and state that this is the only [42] communication received from the Equitable Life Assurance Society.

(7) Q. Please state whether you received any written communications from Harold P. Morgan, of Hays & Bradstreet, Los Angeles, California, during the months of November and December, 1942.

A. Yes. Four letters were received from Mr. Morgan dated respectively November 16, 1942, November

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17, 1942, December 8, 1942, and December 24, 1942. The first three were addressed to Mr. Arnold, Manager of the Underwriting Department; the last was addressed to me.

(8) Q. If your answer to cross-interrogatory No. 7 is in the affirmative please hand the copy or copies of such correspondence to the Notary Public and request that the same be marked Defendants' Exhibit No. 4 for identification, and that they be attached to your deposition.

A. I hand to the Notary a letter from Harold P. Morgan to Doane Arnold, dated November 16, 1942, and also a letter from Harold P. Morgan to Doane Arnold, dated November 17, 1942, and request that these letters be marked "Defendants' Exhibit No. 4" for identification and that they be attached to my deposition.

(Letters dated November 16, 1942, and November 17, 1942, from Harold P. Morgan to Doane Arnold, are marked as Defendants' Exhibit 4 for identification.)

With respect to the letter received from Mr. Morgan [43] dated December 8, 1942, as cited in my previous reply to Cross-Interrogatory No. 7, I refer to Plaintiff's Exhibit No. 5.

With respect to the letter received from Mr. Morgan dated December 24, 1942, as cited in my reply to previous Cross-Interrogatory No. 7, I refer to Plaintiff's Exhibit No. 6.

(9) Q. Please state whether you sent any letters or wires to Harold P. Morgan, of Hays & Bradstreet, or New England Mutual Life Insurance Company of Boston, at Los Angeles, California, relative to Abe Lutz

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or the application of Abe Lutz for insurance with the New England Mutual Life Insurance Company.

A. No letters or wires were sent to Harold P. Morgan. Three wires and three letters were sent over the period from December 1, 1942, to April 8, 1943. Four of these were sent by the Underwriting Department and two by the Medical Department. Three of them were addressed to Hays & Bradstreet, three of them to the New England Mutual Life Insurance Company at Los Angeles.

(10) Q. If your answer to cross-interrogatory No. 9 is in the affirmative, please hand the letters or wires to the Notary Public and request that the same be numbered as a group as Defendants' Exhibit No. 5 for identification, and that they be attached to your deposition.

A. I hand to the Notary copy of telegram dated [44] December 1, 1942, from the Underwriting Department to the New England Mutual Life Insurance Company, Los Angeles; also photostatic copy of a document attached to the Cross-Interrogatories bearing date December 1, 1942, being a letter from Doane Arnold to Messrs. Hays & Bradstreet; also copy of a telegram from the New England Mutual Life Insurance Company at Boston to the New England Mutual Life Insurance Company at Los Angeles, dated April 8, 1943, entered on the back of a letter from Harold P. Morgan to Dr. Frederick R. Brown, dated April 5, 1943, and I request that these three communications be marked "Defendants' Exhibit No. 5" for identification and that they be attached to my deposition.

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(Copy of telegram dated December 1, 1942, from Underwriting Department to New England Mutual Life Insurance Company, Los Angeles, photostatic copy of a document bearing date December 1, 1942, being letter from Doane Arnold to Messrs. Hays & Bradstreet, and copy of a telegram from New England Mutual Life Insurance Company, Boston, to New England Mutual Life Insurance Company at Los Angeles, dated April 8, 1943, are marked as Defendants' Exhibit 5 for identification.)

I also hand to the Notary a photostatic copy of letter from Dr. H. M. Frost, Medical Director, to Hays & Bradstreet, dated December 14, 1942, and request that it be marked "Defendants' Exhibit No. 11" for identification and [45] that it be attached to my deposition.

(Photostatic copy of letter dated Decemebr 14, 1942, from H. M. Frost to Hays & Bradstreet, is marked as Defendants' Exhibit 11 for identification.)

I also hand to the Notary a photostatic copy of letter from Dr. F. R. Brown, Associate Medical Director, to Messrs. Hays & Bradstreet, dated January 14, 1943, and request that it be marked "Defendants' Exhibit 12" for identification and that it be attached to my deposition.

(Photostatic copy of letter dated January 14, 1943, from F. R. Brown to Hays & Bradstreet, is marked as Defendants' Exhibit 12 for identification.)

I hand to the Notary photostatic copy of telegram from New England Mtual Life Insurance Company to New England Mutual Life Insurance Company at Los Anegels, dated December 29, and request that it be marked "Defendants' Exhibit No. 13" for identification and that it be attached to my deposition.

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(Photostatic copy of telegram dated December 29, from New England Mutual Life Insurance Company, Boston, to New England Mutual Life Insurance Company, Los Angeles, is marked as Defendants' Exhibit 13 for identification.)

(11) Q. Please state whether New England Mutual Life Insurance Company of Boston is a member of the Medical Information Bureau located in Cambridge, Massachusetts? A. Yes. [46]

(12) Q. Please state whether you are a member of the Medical Information Bureau located in Cambridge, Massachusetts?

A. No. Life insurance companies only can be members of said Bureau, not individuals.

(13) Q. Please state whether New England Mutual Life Insurance Company obtained from the Medical Information Bureau during the month of November or December, 1942, any information concerning Abe Lutz?

A. Yes.

(14) Q. If your answer to cross-interrogatory 13 is in the affirmative, and the information received was oral, please give the substance of such information. If your answer is in the affirmative, and the information was conveyed by means of a written communication, please state when you first received such communication and then hand the communication just identified to the Notary Public with the request that it be marked Defendants' Exhibit No. 6 for identification, and that such communication be attached to your deposition.

A. The information was conveyed upon a printed card, in code, and was filed in the Medical Department at the

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Home Office. This card is not available for the following reason: It is customary with the New England Mutual Life Insurance Company, as with most other life insurance companies, to remove from their files and to destroy by burning the cards of policyholders who have died; these [47] cards being removed and burned four times yearly, once every three months. The card of Mr. Lutz was burned following this routine custom. However, I know what the information was which was entered on this card. The information was that some company had made a blood sugar test, the result of which was satisfactory; and that on two or more examinations of the urine no sugar had been found in the urine. I know furthermore that no other information was received from this source during the months of November and December, 1942.

Mr. McGinley: Your Honor, the defendants move to strike that portion of the answer of the witness beginning with the word, "However, I knows what the information was which was entered on this card," and continuing to the end of the answer, on the ground that it is not responsive; and, secondly, on the ground that no proper foundation is laid which would permit the witness to give his opinion as to what was contained on the card.

The Court: Don't you get what you asked for in 13:

"Please state whether New England Mutual Life Insurance Company obtained from the Medical Information Bureau during the months of November or December, 1942, any information concerning Abe Lutz."

"14. If your answer to cross interrogatory 13 is in the affirmative, and the informtion received was oral, please give the substance of such information."

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He says: "The information was conveyed upon a printed [48] card, in code, and was filed in the Medical Department at the Home Office. This card is not available." Maybe it is not responsive. It might be brought in by the other side on the ground of the loss of the card, but he volunteered something that was not in the question. It really was not oral, but information actually contained on the card he is revealing.

Mr. Herndon: I submit, your Honor, that the answer is responsive; that it is also proper explanatory matter of the answer. I doubt, under the circumstances, that the objection here made is timely.

The Court: Were not all objections reserved to this time?

Mr. Herndon: Yes, I think all objections to form were reserved. I submit, your Honor, the fact that an answer is not strictly responsive is not, under all the circumstances, a sufficient reason for the striking or refusal to receive it. It would only be by a very strict construction of the question that this answer is not entirely responsive.

The Court: "Please state whether New England Mutual Life Insurance Company obtained from the Medical Information Bureau during the month of November or December, 1942, any information concerning Abe Lutz."

Now, the answer to that was yes. Then in cross interrogatory 14: "If your answer to cross interrogatory [49] 13 is in the affirmative, and the information received was oral, please give the substance of such information." That does not apply, because his answer shows that the information was not oral. —"If your answer is in the

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affirmative, and the information was conveyed by means of a written communication, please state when you first received such communication and then hand the communication just identified to the Notary Public with the request that it be marked Defendants' Exhibit No. 6 for identification, and that such communication be attached to your deposition." —Now, of course, you could have asked where the card was, and show that it had been destroyed; then the contents of it could be proved by you. The motion to strike will be granted.

(15) Q. Before approving the issuance of policy No. 1,172,844 which you have previously testified to, please state whether any investigation was made by you or your department of Abe Lutz' previous insurance record. If your answer is in the affirmative please state fully what was done by you or your department in making such investigation? A. No.

(16) Q. Please state whether you knew at the time you approved the issuance of policy No. 1,172,844 that Abe Lutz had been previously examined by Dr. John M. Waste shortly prior to November 16, 1942 for a policy of \$10,000 in the Equitable Life Assurance Company?

A. Yes. [50]

(17) Q. Please examine photostatic copy of a document attached to these cross-interrogatories bearing date December 1, 1942, being a letter from Doane Arnold to Messrs. Hays & Bradstreet, and state whether you have previously seen the original or a copy of said document?

A. Yes, the photostatic copy referred to is incorporated in Defendants' Exhibit No. 5.

The Court: It was my understanding that your motion to strike only went as far as the words "found in the

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urine," in the unmarked line, the third from the bottom, is that correct?

Mr. McGinley: My motion to strike the portion of the answer given under 14, your Honor, commences with the word "However", in the middle of the answer, and concludes with the date, "December, 1942."

The Court: Then it should be denied as to the last sentence, and granted as to that portion running down to the words "found in the urine." The last sentence is responsive.

Mr. McGinley: Yes.

(18) Q. If your answer is in the affirmative to cross-interrogatory No. 17, please name the person by whom it was exhibited to you?

A. Said letter was not exhibited to me by any person. It was seen by me on several various occasions when I was obliged to review the file of papers. [51]

(19) Q. Prior to the issuance of policy No. 1,172,844 by New England Mutual Life Insurance Company had you been informed that Abe Lutz had been attended by Dr. Rosenfeld and Dr. Lissner? A. Yes.

(20) Q. If your answer to cross-interrogatory No. 19 is in the affirmative, please answer the following:

(a) When did you acquire such information?

(b) By whom was such information furnished?

(c) If such information was conveyed by conversation, give the name of parties present, and the substance of said conversation.

(d) If such information was conveyed by written communication or communications, please hand the same to the Notary Public and request that they be marked Defendants' Exhibit No. 7 for identification, and that they be attached to your deposition.

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A. With respect to said information and as concerns attendance upon Mr. Lutz by Dr. Rosenfeld, this latter information first came to my attention the first time I reviewed the application, which was November 20, 1942; and because of the fact that Mr. Lutz, in his answers in Part II of his application had indicated that an examination of him had been made by Dr. Rosenfeld on one occasion only, in August, 1942. As concerns attendance upon Mr. Lutz by Dr. Lissner, I first became aware of this information on [52] November 27, 1942, on receipt of a letter from the Medical Director of the Equitable Life Assurance Society in which the fact was mentioned. This letter is Plaintiff's Exhibit No. 4.

(21) Q. If your answer to cross-interrogatory No. 19 is in the negative, please state when you were informed that Dr. Rosenfeld and Dr. Lissner had attended Abe Lutz?

A. In answer I refer to my replies to Cross-Interrogatories Nos. 19 and 20.

(22) Q. Please examine the photostatic copy of a document attached to these cross-interrogatories bearing the heading "ATTENDING PHYSICIAN'S STATEMENT" and state if you have previously seen the original of such statement? A. Yes.

(23) Q. Please hand the photostatic copy of the document entitled "ATTENDING PHYSICIAN'S STATEMENT" just mentioned and request that it be marked Defendants' Exhibit No. 8 for identification, and that it be attached to your deposition.

A. I hand to the notary a photostatic copy of a document entitled "Attending Physician's Statement," just mentioned, and request that it be marked "Defendants'

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Exhibit No. 8" for identification and that it be attached to my deposition.

(Photostat of document, Attending Physician's Statement, is marked as Defendants' Exhibit 8 for identification.)

(24) Q. Is it not a fact that during the months of [53] November and December, 1942, the document entitled "ATTENDING PHYSICIAN'S STATEMENT" just identified was used by New England Mutual Life Insurance Company in obtaining information from physicians or surgeons of applicants for insurance in those cases where the New England Mutual Life Insurance Company had been given the name of such attending physicians or surgeons?

A. No. It was used only in those cases in which, in the judgment of a medical director or a medical examiner or of an agent it would be advisable to get first hand information from the attending physician or surgeon. It was not used routinely in all cases in which the name of an attending physician or surgeon had been given in the applicant's answers to the questions in Part II of the application. It was used if the replies of the applicant in his answers to the questions in Part II of the application threw definite doubt upon the applicant's medical history. It was routinely used for the larger amounts of insurance, in excess of \$15,000.

(25) Q. From your knowledge of the usages and practices among life insurance companies generally, as prevailing during the months of November and December, 1942, is it not a fact that the New England Mutual Life Insurance Company mailed to attending physicians and

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surgeons whose names had been obtained by the New England Mutual Life Insurance Company in connection with an application for insurance the [54] document entitled, "ATTENDING PHYSICIAN'S STATEMENT"?

A. In answer I refer to my reply to previous Cross-Interrogatory No. 24.

(26) Q. After you had examined the application of Abe Lutz for a policy of life insurance in the New England Mutual Life Insurance Company, did you observe that Dr. Maurice H. Rosenfeld was named by Abe Lutz as his physician, and that he had had a physical examination in August of 1942? A. Yes.

(27) Q. If your answer to cross-interrogatory No. 26 be in the affirmative, please state whether you mailed to Dr. Rosenfeld a copy of the document entitled "Attending Physician's Statement"?

A. No. I did not at any time mail to Dr. Rosenfeld a copy of the document entitled "Attending Physician's Statement."

(28) Q. Please state whether you did at any time mail to Dr. Lissner a copy of the document entitled "Attending Physician's Statement"?

A. No, I did not at any time mail to Dr. Lissner a copy of the document entitled "Attending Physician's Statement."

(29) Q. If your answer to plaintiff's interrogatory No. 40 is that you did approve the application for policy of insurance No. 1,172,844, please state whether such approval [55] was oral or evidenced by a written communication. If the latter, please hand to the Notary Public a copy of such communication and request that it

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be marked Defendants' Exhibit No. 9, and that it be attached to your deposition.

A. Such approval was evidenced by my personal stamp, by my handwritten notations, and by my signature upon the work sheet of the application. This work sheet has already been entered as Plaintiff's Exhibit 1a.

(30) Q. If your answer to plaintiff's interrogatory No. 47 is in the affirmative and such information is in writing, please hand to the Notary Public such document or documents as contain such information and request the Notary Public to mark such document or documents as Defendants' Exhibit No. 10, and request that they be attached to your deposition.

A. In answer I refer to Plaintiff's Exhibits 5 and 6 and to Defendants' Exhibit No. 2.

(Short recess.)

(31) Q. If your answer to plaintiff's interrogatory No. 51 is in the affirmative please describe the routine which is followed by the New England Mutual Life Insurance Company of Boston following the approval by you of an application for insurance and the ultimate issuance of policy No. 1,172,844?

A. With respect to the routine which is followed by the New England Mutual Life Insurance Company following [56] approval by me of an application for life insurance, I refer to my reply to Direct Interrogatory No. 14. With respect to the routine which was followed in the case of Policy No. 1,172,844 and the ultimate issuance of this policy, the routine and the ultimate issuance were as described by me in my reply to Direct Interrogatory No. 14.

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(32) Q. There is attached to these cross-interrogatories a document dated December 14, 1942, being a letter from you to Hays & Bradstreet at Los Angeles, California. Please examine the same and state when you mailed the original.

Please hand the document identified in the last cross-interrogatory to the Notary Public and request that it be marked Defendants' Exhibit No. 11, and attached to your deposition.

A. I mailed the original on December 14, 1942. The pencil notations on this document were not on our communication when it was mailed from the Home Office. This document has already been presented by me to the Notary with the request that it be marked "Defendants' Exhibit No. 11" for identification and that it be attached to my deposition, as indicated in my reply to Cross-Interrogatory No. 10.

(32a) Q. After examining the document, Defendants' Exhibit No. 11, please state what facts and circumstances made necessary the request for obtaining complete detailed statements from Dr. Rosenfeld and Dr. Lissner as recited in Defendants' Exhibit No. 11. [57]

A. The reason for requesting detailed statements from Doctors Rosenfeld and Lissner arises from the fact that Medical Directors have learned from unfortunate experience that the statements of applicants as to their consultations with physicians must be evaluated with caution. Medical Directors are convinced that the average individual intends to be honest. However, we have learned that some applicants apparently attempt to conceal damaging information; that others have not understood the information as to their condition given them by their

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physicians and therefore have not considered it significant; that others have actually not been advised by their physicians as to the significance of serious signs or symptoms which the physician had discovered. Not infrequently a statement from the physician will prove that what appeared an insignificant consultation, from the information given by the applicant in his answers to questions in Part II of his application, was actually a serious matter, the physician having discovered signs and symptoms which would forbid issuance of life insurance at standard rates and might necessitate its issuance at substandard rates, or might necessitate rejection of the risk.

As a practical procedure, considerations of expense in obtaining such statements, for which the physicians must be paid by the company, and the delay in issuing policies as a consequence of requesting such statements, [58] influence the Medical Director in formulating his policy as to how frequently and in what types of cases a physician's statement will be required.

In the case of applications for large amounts of insurance, a routine requesting of physician's statements is necessary for the protection of the company as large amounts are at risk. As for small applications, amounts under \$15,000, within which range the great majority of applications fall, the routine requests are neither practical nor feasible because of excessive expense and undue delay in issuing policies.

The only practical policy as respects applications for small amounts of insurance is to request physicians' statements only when the applicant in his statements as to his medical history raises definite doubt as to his insurability.

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Further, it is common knowledge among medical directors that applicants at the older insurance ages, the late fifties and the sixties, must be scrutinized much more carefully as to medical history and condition of health than in the case of applicants of younger ages. Companies generally do not issue to older applicants as much insurance as to younger applicants, because in general the older applicants are not as good physical ratings as the younger applicants.

In the case of Mr. Lutz, when I reviewed his application [59] I noted that he was in his sixty-fifth year, a definitely advanced insurance age. He applied for \$13,000 of insurance. At the same time a request was made for an additional \$13,000 of insurance. For a man as old as Mr. Lutz, \$13,000 of insurance would be considered only a moderate amount to be issued by a company the size of the New England Mutual Life Insurance Company. while \$26,000 of insurance would be considered a large amount to be retained by such a company.

As I had no reason to doubt the accuracy of the statements of Mr. Lutz as to his medical history, I, depending upon his honesty, believed that I could safely approve his application for \$13,000 of insurance without asking for statements from Doctors Rosenfeld and Lissner. His physical examination was satisfactory, and I had no other information of an unfavorable nature as respects his medical history or health. I therefore approved his application for \$13,000.

I believed, however, that, in view of his advanced insurance age, that for his age the amount of \$26,000 life insurance was a large amount to be issued by my company, and the fact that he had admitted consulting Dr.

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Rosenfeld, and to my knowledge had consulted Dr. Lissner, that it would be advisable to request the detailed statement as recited in Defendants' Exhibit No. 11, whereupon this statement was requested.

(33) Q. Is it not a fact that on December 14, 1942, the [60] Medical Department of the New England Mutual Life Insurance Company felt that the health and condition of Abe Lutz was not acceptable as an insurance risk in the absence of a complete detailed statement from Dr. Rosenfeld and Dr. Lissner as to their treatment of Abe Lutz.

A. No. I had no reason to doubt his health and condition. His medical history, as he had given it in Part II of his application, was favorable. His examination was satisfactory. I had no facts from any other source which threw any doubt upon his medical history. It is a fact that I was not willing to approve his application for additional insurance until I had received satisfactory statements from his physicians. The reason for this unwillingness appears in my reply to previous Cross-Interrogatory No. 32a.

(34) Q. What information, if any, had you acquired between November 16, 1942, and December 14, 1942, which, in your opinion, made necessary the requirement that a complete detailed statement such as is referred to in Defendants' Exhibit No. 11 be obtained from Dr. Rosenfeld and Dr. Lissnes?

A. In the letter from the Medical Director of the Equitable Life Assurance Society dated November 25, 1942, and entered as Plaintiff's Exhibit No. 4, it was indicated that Dr. Lissner had been consulted by Mr. Lutz as well as Dr. Rosenfeld. This fact was not known to

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me before, as [61] Mr. Lutz had not mentioned Dr. Lissner in his application. Having become aware of this fact, I included Dr. Lissner in the request for an attending physician's statement of December 14, 1942, as given in Defendants' Exhibit No. 11. I had acquired no other information. The reason for requesting the statement appears in my reply to Cross-Interrogatory No. 32a.

(35) Q. When you failed to receive the statements as required in your letter, Defendants' Exhibit No. 11. from Dr. Rosenfeld and Dr. Lissner, you recommended, did you not, that the application of Abe Lutz for additional insurance be rejected? A. Yes.

(36) Q. Is it not a fact that if the requested statements designated in Defendants' Exhibit No. 11 had been furnished and they were satisfactory you would have approved the issuance of an additional policy of insurance for \$13,000 to Abe Lutz?

A. No. While I would have been satisfied, from the medical angle, as to the insurability of Mr. Lutz for the additional \$13,000 of insurance if the said physicians' statements had been submitted and had proved acceptable, there was another reason to doubt whether Mr. Lutz was insurable for the additional \$13,000 of insurance.

I refer to the letter written on December 1, 1942, by Doane Arnold, Manager of the Underwriting Department, to [62] Messrs. Hays & Bradstreet, a part of Defendants' Exhibit No. 5, advising that we would consider him for the additional \$13,000 of insurance subject to evidence of an adequate insurable interest, together with a new Part I of the application and physicians' statements.

On December 1, 1942, we doubted whether there was adequate insurable interest with respect to this additional

(Deposition of Harold M. Frost)

\$13,000 of insurance. Other information which came to us later so increased this doubt as to convince us that we would not be justified in issuing this additional \$13,000, even though the requested physicians' statements were received and proved satisfactory.

As a matter of fact, on April 5, 1943, Harold P. Morgan wrote Dr. Frederick R. Brown, Associate Medical Director, asking us to give further consideration for the additional \$13,000 cited above, and for even more, up to our limit at the age of Mr. Lutz.

We received this letter on April 7, 1943. It appears on the reverse side of the telegram of April 8, 1943, which is in as a part of Defendants' Exhibit No. 5.

I hand said letter to the Notary and request that it be marked "Plaintiff's Exhibit 7" for identification, and that it be attached to my deposition.

(Letter dated April 5, 1943, from Harold P. Morgan to Dr. Frederick R. Brown, is marked as Plaintiff's Exhibit 7 for identification.) [63]

On April 8, 1943, we wired the New England Mutual Life Insurance Company at Los Angeles that we must decline because of additional confidential information which we had received since we issued Policy No. 1,172,844. That telegram is a part of Defendants' Exhibit 5.

This confidential information had no bearing upon the medical history or health of Mr. Lutz. In fact, when the wire cited above was sent on April 8, 1943, we had received no information of any sort throwing doubt upon the medical history or health of Mr. Lutz. It was not until after his death that, as a result of our investigation, information was discovered which threw serious doubt

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upon his medical history. This information cited in our telegram of April 8, 1943, consisted of two MIB confidential reports, one received by us on January 5, 1943, the other in March, 1943, both of them to the effect that Mr. Lutz was suspected of trying to get more life insurance than he was entitled to from the point of view of insurable interest. These two reports, added to the doubt already in our minds as to the insurable interest, as cited above, constrained us to refuse to proceed further.

(37) Q. Referring again to Defendants' Exhibit 11, please state whether you were following the routine practice and usage of the New England Mutual Life Insurance Company of Boston as the same prevailed during the months of November and December, 1942, in requiring statements of the type [64] requested in Defendants' Exhibit No. 11? A. Yes.

(38) Q. If your answer to cross-interrogatory No. 37 is that you were not following the usual practice and custom of New England Mutual Life Insurance Company of Boston as the same prevailed during the months of November and December, 1942, in requesting the statements above mentioned, please state what circumstances made necessary the requesting of such requirements as set forth in Defendants' Exhibit No. 11?

A. See answer to previous Cross-Interrogatory No. 37.

(39) Q. Is it not a fact that in considering the application of Abe Lutz for additional insurance during the month of December, 1942, you were not satisfied with the information appearing on the application (Plaintiff's Exhibit 1) and the medical report of Dr. Waste (Plaintiff's Exhibit 2) and for that reason you required

(Deposition of Harold M. Frost)

full and complete information from the attending physicians, Dr. Rosenfeld and Dr. Lissner?

A. No. In answer I would refer to my reply to Cross-Interrogatory No. 32a.

(40) Q. If your answer to cross-interrogatory No. 39 is in the negative please give the reasons why you did not request full and complete statements of the character set forth in Defendants' Exhibit No. 11, from Dr. Rosenfeld and Dr. Lissner prior to the time that you approved the issuance of policy No. 1,172,844. [65]

A. In answer I refer to my reply to Cross-Interrogatory No. 32a.

(41) Q. Please state whether you personally knew Abe Lutz, the insured named in policy No. 1,172,844?

A. No.

(42) Q. Please state if you at any time prior to the issuance of policy No. 1,172,844, heretofore identified, personally examined Abe Lutz, the insured, with reference to his application for insurance? A. No.

The Court: What does "MIB Confidential Reports" mean?

Mr. McGinley: That, your Honor, stems from the Medical Information Bureau, which is the central clearing house for all major insurance companies.

The Court: I assumed it was, but the record did not show. May it be stipulated that "MIB" refers to "Medical Information Bureau"?

Mr. Herndon: Yes.

Mr. McGinley: So stipulated.

(43) Q. There is attached to these cross-interrogatories a document in the form of a letter dated January 14, 1943, from F. R. Brown, Associate Medical Director,

(Deposition of Harold M. Frost)

addressed to Messrs. Hays & Bradstreet, which please examine, and state whether you have previously seen said document. Please hand the document dated January 14, 1943, to the Notary Public and [66] request the Notary to mark the letter just identified as Defendants' Exhibit 12 for identification; and that the same be attached to your deposition.

A. Said document has already been handed to the Notary and marked Defendants' Exhibit No. 12 for identification, to be attached to my deposition. See answer to Cross-Interrogatory No. 10.

(44) Q. Directing your attention to Defendants' Exhibit No. 12 please state if you are personally acquainted with Mr. F. R. Brown? A. Yes.

(45) Q. If your answer to cross-interrogatory No. 44 is in the affirmative, please state if F. R. Brown was employed in the Medical Department of the New England Mutual Life Insurance Company during the month of December, 1942? A. Yes.

(46) Q. During the months of November and December, 1942, how many Medical Directors, to your knowledge, were employed by New England Mutual Life Insurance Company of Boston at its Home Office in Boston?

A. Three medical directors were employed by the New England Mutual Life Insurance Company during the months of November and December, 1942.

(47) Q. Please name the officer of the New England Mutual Life Insurance Company of Boston during the months of November and December, 1942, from whom you received instruc- [67] tions as to your employment and duties.

(Deposition of Harold M. Frost)

A. George Willard Smith, President, New England Mutual Life Insurance Company.

(48) Q. Is it not a fact that your duties in connection with your employment by New England Mutual Life Insurance Company are confined to the Medical Department of said company? A. Yes.

(49) Q. There is attached to these cross-interrogatories a document, being a telegram dated December 29, 1942, addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue, Los Angeles, California, which please hand to the Notary Public and request the Notary to mark as Defendants' Exhibit 13 for identification and attach the same to your deposition?

A. Said document has already been handed to the Notary, to be marked Defendants' Exhibit No. 13 for identification and to be attached to my deposition. See answer to Cross-Interrogatory No. 10.

(50) Q. Please examine the telegram identified in cross-interrogatory No. 49, and state whether you are the author of said telegram?

A. I was not the actual author of the telegram, though it was sent in accordance with my determinations.

(51) Q. Are you employed by the New England Mutual Life Insurance Company under an oral contract or a written contract? [68]

A. I am employed under an oral contract.

(52) Q. If your answer to cross-interrogatory No. 51 is that you are employed under a written contract, please hand to the Notary Public a copy of your contract of employment, ask the Notary Public to mark it as Defendants' Exhibit No. 14, and attach the same to your deposition.

A. See answer to Cross-Interrogatory No. 51.

(Deposition of Harold M. Frost)

(53) Q. Please state whether you were furnished a copy of plaintiff's interrogatories to examine prior to the time that you personally appeared before the Notary Public to answer the same? A. Yes.

(54) Q. If your answer to cross-interrogatory No. 53 is in the affirmative, please state the name of the person from whom you received the interrogatories?

A. Vincent V. R. Booth, Esq., attorney for the New England Mutual Life Insurance Company.

Mr. McGinley: As part of the cross examination, your Honor, of the witness Frost, the defendants and counter-claimant offer in evidence the documents which are referred to on the cross examination.

Mr. Herndon: If your Honor please, we make a general objection to those documents. I am perfectly satisfied to allow your Honor to rule on them with a general objection. If your Honor prefers, I can take them separately. [69]

The Court: What is the nature of the general objection?

Mr. Herndon: My objection to the correspondence between Harold P. Morgan and the home office of the plaintiff, is that it is immaterial in that it has no tendency to prove any issue in this case with respect to any matter of waiver or estoppel, in that all such correspondence appears on its face to be corroborative of the matter stated in the application of the insured.

With respect to all correspondence subsequent to December 1, 1942, the date of the issuance of the policy, we submit that it is immaterial; has no relation to the issuance of the policy in suit; that no information contained in any of the letters has any tendency to prove any fact with

respect to knowledge that the answers of the insured were false, and there is no foundation sufficient to show that Harold P. Morgan is an agent, an authorized agent of plaintiff.

I make that same objection to each of the documents offered by defendants.

The Court: Do you mean that it is your position that Morgan was not an agent of any kind, even a soliciting agent for the company?

Mr. Herndon: We stipulated that Mr. Morgan is an employee of Hayes & Bradstreet, who are given the title, and sometimes called "General Agents"; however, the authority of [70] Hays & Bradstreet is strictly limited under the contract of agency which we have. We do not concede that Hays & Bradstreet had any authority to bind the company, their authority being limited to the soliciting of policies of insurance and the collection of premiums on policies. That essentially is the extent of their authority.

The Court: Of course, it is pretty hard to draw a line in a suit of this kind. I don't think there becomes directly involved the question of the authority of a general agent as distinguished from a soliciting agent, because it is apparent that Morgan was very anxious, as probably were his principals, to get additional insurance through so he could get his premium; but as a matter of fact, apparently the company did not consider themselves bound by anything he said, because they did not issue the additional insurance; so that's that; and this is not a suit against Morgan for misrepresentation or against his principals for that purpose. As I understand the issues here raised by the defendant, that assuming the contention of plaintiff to be sound from a legal and factual standpoint, and proved, that even so the plaintiff has waived

its right, or that it is estopped from asserting either, 1. The invalidity ab initio of the policy, or 2. Any fraud occurring in its original issuance. Is that so?

Mr. McGinley: That is correct, your Honor.

The Court: Now, here evidence is produced of [71] information purportedly furnished by an employee, or at least soliciting agents, which may throw light on the entire matter. It is very difficult for the court, under the rules of federal procedure, to draw a strict line. My general view is that the evidence is admissible under our federal rules. I shall accept it, however, with material reservations for further study, and subject to a motion to strike out. It is my understanding that you both wish to introduce in evidence the interrogatories, and the answers thereto, and the cross interrogatories, and their answers thereto, and that the defendant wishes also the admission of the exhibits to the cross interrogatories, and plaintiff wishes the admission of the exhibits to their interrogatories?

Mr. Herndon: Yes, your Honor.

The Court: Subject to a motion to strike they will all be admitted. I will ask the clerk to be very careful in putting these exhibits in here to see that they may be opened up so they may be easily examined and then filed afterward.

You desire for the admission to include also the stipulation which precedes the interrogatories, I presume?

Mr. Herndon: Yes.

The Court: The documents which are marked 3-A and marked 3-B will be received.

(Whereupon an adjournment was taken until 2:00 o'clock p. m., Wednesday, March 28, 1945.) [72]

(March 28, 1945.)

AFTERNOON SESSION
2:00 O'CLOCK.

Mr. Herndon: If your Honor please, during the noon recess counsel for plaintiff and defendants agreed that the exhibits offered just before the close of the last session of court might bear designation as follows: The stipulation for the taking of the deposition of Dr. Frost, to which are attached the interrogatories and cross interrogatories has been marked Plaintiff's Exhibit No. 26. The deposition that is the answers of the witness to the interrogatories and cross interrogatories may be marked as Plaintiff's Exhibit 27. That Exhibit 27 also includes those exhibits for identification in the deposition which were offered by plaintiff. They are Plaintiff's 1, 2, 3, 4, as identified in the deposition. The exhibits attached to the deposition of Dr. Frost, which were offered by defendants and counterclaimant have been marked Defendants' Exhibit D, and they are in evidence.

The Court: So stipulated?

Mr. McGinley: So stipulated. [73]

* * * * *

Mr. McGinley: If your Honor please, the next witness to be called was Harold Morgan, and a situation has developed there with regard to his not appearing here, which I believe I should call to the attention of the Court; Mr. Morgan is an employee of Hays & Bradstreet, and prior to the time of trial I took a brief deposition, principally with regard to laying the foundation for the introduction of the exchange of correspondence between the local office and the home office of plaintiff. I also subpoenaed him to be here as a witness. Yesterday

counsel for plaintiff handed me a letter dated March 27, 1945, from Doctor Guy van Scoyo, 1020 Associated Realty Building, Los Angeles, which reads as follows: "To Whom It May Concern: This will certify that Mr. Harold P. Morgan is under my professional care; at the present time he is in Saint Vincent's Hospital suffering from hemorrhages of the stomach. It will be impossible for him to appear in court for at least sixty days, inasmuch as an operation is contemplated." And that is signed by the doctor.

Rather than request a continuance, your Honor, even though the deposition is fragmentary compared to what I otherwise would have gone into in the event I knew he was not going to be available, counsel has suggested to me that they would waive the signing and correction of the deposition, [74] and if it meets the convenience of the Court, under the circumstances, I will read the deposition of Mr. Morgan.

Mr. Herndon: Yes, your Honor, counsel has correctly stated the matter. I might supplement it to this extent, that we too had expected the witness to be here, and our failure to cross examine him was due to our supposition that he would be in court.

The Court: It is just one of those unfortunate things which cannot be helped. Let us see what there is in the deposition. We will accept the stipulation, and you may proceed to read the deposition.

Mr. Herndon: I take it counsel will stipulate that the Court may take into consideration, in weighing the testimony, all of the circumstances, including those stated

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by counsel, and the fact that the deposition has not been signed and corrected, and the failure to cross examine is due to the circumstances mentioned.

Mr. McGinley: So stipulated. In connection with the deposition about to be read, your Honor, and merely for the limited purpose of identifying Harold P. Morgan in connection with other evidence which will be introduced, we offer in evidence at this time a letter on the stationery of the New England Mutual Life Insurance Company, Boston, dated December 31, 1942, addressed to Mr. Stanley Leeds, and signed Harold P. Morgan, and I would like to inquire if it will be stipulated by counsel, on examination of this [75] document, if this letter bears the signature of Harold P. Morgan?

Mr. Herndon: Yes, we will stipulate that it does.

Mr. McGinley: For the limited purpose which I have stated, I will therefore offer in evidence the letter dated December 31, 1942.

Mr. Herndon: Plaintiff objects to the offer, your Honor, on the ground it is immaterial, and on the further ground that it is not binding on the plaintiff, and that no proper or sufficient foundation has been laid to prove that it would be binding on the plaintiff.

The Court: Let me see the letter, Mr. Clerk. It is merely cumulative. It is all in the record, anyway.

Mr. McGinley: Yes, your Honor. If your Honor might reserve a ruling on it?

The Court: Let it be marked for identification.

The Clerk: Defendants' Exhibit E.

Mr. McGinley: I am reading the deposition of Harold P. Morgan, called as a witness on behalf of the defendants and counter claimant, taken on Friday, March 2, 1945, commencing at 9:30 o'clock a. m., at the offices of McLaughlin & McGinley, Esqs., Los Angeles, California, before William H. Davis, a Notary Public in and for the County of Los Angeles, State of California, pursuant to the annexed stipulation.

Appearances, for the plaintiff, Messrs. Meserve, [76] Mumper & Hughes, by Leo E. Anderson, Esq., 615 Richfield Building, Los Angeles, California.

For the defendants: Messrs. McLaughlin & McGinley, by John P. McGinley, Esq., 1224 Bank of America Building, Los Angeles, California.

(Deposition of said Harold Morgan was here read by Mr. McGinley.)

HAROLD MORGAN,

called as a witness by and on behalf of defendants and counter-claimant, being first duly sworn, was examined and testified as follows:

(Discussion off the record.)

Mr. McGinley: See if I state it correctly, then, Mr. Anderson. May the record show that at this time the deposition of Mr. Harold Morgan is being taken by the defendants and the counter-claimant, with the understanding that if a foundation is shown by the testimony of this witness or other evidence such as to make Mr. Morgan the agent of the plaintiff, that the propriety of taking the deposition of Mr. Morgan as the agent of the plaintiff will be passed upon by the trial court at the time of trial.

(Deposition of Harold Morgan)

Mr. Anderson: Well, my position is that I am perfectly willing to stipulate that his deposition be taken at this time without getting out notice and subpoena, but I don't concede the right of the defendants to take the deposition, in any other capacity except as their own witness. [77]

Mr. McGinley: Yes, I understand your position, Mr. Anderson. And so that that issue may not be passed upon here, so that neither one of us is prejudiced, may we have the understanding that the trial court may pass upon the question of his capacity as an agent for the plaintiff or otherwise at the time of trial?

Off the record.

(Discussion off the record.)

Mr. Anderson: For the record, my previous statement is the position that I would take on this. I am perfectly willing to have the deposition taken without notice or subpoena, but the question as to whether or not he is your witness or an agent of the plaintiff is something that I am not willing to stipulate on now.

Mr. McGinley: That is satisfactory, Mr. Anderson. The only purpose of my statement was to make clear that the question of whether or not he is a witness on behalf of the defendants and counter-claimant, or whether or not the defendants and counter-claimant may take advantage of any statements in the form of admissions made as binding the plaintiff, be left open to the trial court.

Mr. Anderson: Well, you are taking it at your own risk. Whatever happens to it will be your responsibility. I am not going to stipulate that you can or can't.

Mr. McGinley: Well, I think we are in agreement, so I am satisfied. [78]

(Deposition of Harold Morgan)

The Court: In order that there may be no misunderstanding on the part of anyone, it is my understanding from the stipulation that an attempt is here made to call the witness Morgan under the Federal rules, which entitle you to call certain of the opposite parties for examination without being bound by their testimony. The plaintiff refuses to concede that relationship between Morgan and the plaintiff is such that it entitled him to be called under that rule. Therefore, you call him, as indicated, at your peril. If he is not one who is covered under the rule, then he becomes your witness and you are bound by his testimony, when you offer it. If he does come under the rule, you are not bound by his testimony.

Mr. McGinley: That statement is satisfactory.

Mr. Herndon: That is correct, your Honor.

Direct Examination

By Mr. McGinley:

Q. Mr. Morgan, what is your business?

A. I am in the life insurance business.

Q. And do you have an office? A. Yes.

Q. Where is your office?

A. 609 South Grand Avenue, Los Angeles.

Q. Do you conduct your business as an individual or are you an associate or a partner of some other person?

A. I am the brokerage manager for Hays & Bradstreet. [79]

Q. And is Hays & Bradstreet the firm name under which you do business? A. That's right.

Q. How long have you been in the insurance brokerage business? A. Ten years last January 2nd.

(Deposition of Harold Morgan)

Q. And during that period of ten years, have your services and activities been in the City of Los Angeles?

A. Yes.

Q. What business relationship, if any, does the firm of Hays & Bradstreet have with the New England Mutual Life Insurance Company of Boston, Massachusetts?

Mr. Anderson: I object to that on the ground the witness is not qualified to answer that question.

Q. By Mr. McGinley: Do you know whether or not Hays & Bradstreet, the firm with which you are employed or associated, has any business relations with the New England Mutual Life Insurance Company of Boston, Massachusetts?

A. Yes, they do.

Q. And what is that relationship?

Mr. Anderson: I don't think an employee is qualified to testify as to the relationship between his employer and someone else.

Mr. McGinley: I suppose in the last analysis, Leo, it calls for a legal opinion as to his interpretation of [80] whatever business relations there are between Hays & Bradstreet, and maybe I can get at it this way.

Q. What are your duties as an employee of Hays & Bradstreet?

A. The promotion of brokerage business with life agents and general insurance men in Los Angeles, in an effort to bring their business to our office, their surplus business.

Q. And does the firm of Hays & Bradstreet place insurance business with the New England Mutual Life Company?

(Deposition of Harold Morgan)

A. Well, they don't place it. I don't quite understand that question. We merely take an application and forward it to the New England Mutual.

Q. Do I state it fairly in this way, then, Mr. Morgan: When an applicant makes application for insurance with the New England Mutual Life Company, and if they avail themselves of your services as broker or general agent, you transmit the application through your office in Los Angeles to the head office of the New England Mutual Life Insurance Company of Boston, Massachusetts?

A. Yes.

Mr. Herndon: If your Honor please, we object to that question upon the ground that it assumes a fact not in evidence, that the office of Hayes & Bradstreet is a general office, or general agent.

The Court: May it be stipulated that "or general [81] agent" contained in the question be deleted, and the question stand as he has testified, your Honor?

Mr. McGinley: Yes. May I inquire from counsel as shown on the document which is identified, wherein Mr. Morgan is referred to as assistant general agent, if in deleting the words "general agent" the expression "assistant general agent" may stand in the question?

Mr. Herndon: No, if your Honor please. I think the suggestion made by your Honor is accomplished by the succeeding question where the words "general agent" are deleted from the personal description.

The Court: The same question, but those words taken out?

Mr. Herndon: Yes, and we will not object to the question.

The Court: Very well, the stipulation is received with the words "or general agent" deleted.

(Deposition of Harold Morgan)

Mr. Herndon: May the answer be stricken to the last question? We move to strike it?

The Court: We will leave it by leaving the words "or general agent", and just leave the answer.

Mr. McGinley: Well, I will ask the same question, deleting the descriptive characterization "general agent."

Would your answer be the same? A. Yes.

Q. During the year 1942, were you acquainted with a [82] life insurance agent by the name of Stanley Leeds?

A. Yes.

Q. How long had you known Mr. Leeds prior to the year 1942?

A. Oh, several years. I am not sure exactly how long.

Q. Is he one of the persons which would come within the description of parties from whom you promoted business? A. Yes.

Q. During the year 1942 did you have occasion to discuss with Mr. Leeds the application of a party by the name of Abe Lutz for life insurance in the New England Mutual Life Insurance Company of Boston, Massachusetts? A. Yes.

Q. When did you have your first conversation with Mr. Leeds relative to a policy of life insurance or an application for life insurance by Mr. Abe Lutz?

A. I think it was some time in November of 1942.

Q. And where did the conversation take place?

A. As nearly as I recall, it was on the telephone or in my office; I don't remember which.

Q. And what would your recollection be as to the approximate date in November?

A. I think it was the latter part of November.

(Deposition of Harold Morgan)

Q. At that time was there anyone present besides [83] yourself and Mr. Leeds? A. Not that I recall.

Q. What was the conversation?

Mr. Anderson: Just a minute. What is the purpose of the question? It would be entirely hearsay so far as the plaintiff is concerned.

Mr. McGinley: Well, that is begging the same question that we had at the start of the deposition, Leo, and until all the evidence is in, I am not in a position right now to say what foundation will be laid so as to make his testimony binding on the plaintiff. I believe that I can show that Mr. Morgan's testimony in the respects that will be brought out later on in the form of admissions is binding on the plaintiff, and I think that would overcome the objection of hearsay.

Mr. Anderson: Quite frankly, John, I will tell you what our position is right now. It will probably save a lot of time. It is our position that Hays & Bradstreet are not in a position to bind the New England Mutual by any statements.

Mr. McGinley: Yes, I know what your position is, Leo.

Mr. Anderson: And I think the evidence will bear it out.

Mr. McGinley: May we continue, Leo? Just in the interests of expediency, in view of the fact that the trial [84] is on the 27th, to save a lot of work, of going up and getting a ruling on it, make the objection, but allow the witness to answer, reserving your right to have the Court rule on it at the time of trial. The only reason I make that observation is this: We don't have that much time left between now and the time of trial, and if I have to

(Deposition of Harold Morgan)

adjourn this deposition so that the matter may be brought before Judge Jenney, it means about a ten-day delay. My purpose in taking Mr. Morgan's deposition this morning is to see whether or not we can get together on a stipulation of certain facts. Now, I don't see that the suggestion I made will prejudice you in any way, because this testimony can't be read anyway, and your point is reserved.

Mr. Anderson: Well, so far as this conversation with Leeds and taking the application are concerned, I don't think that is of much materiality one way or the other. I have no objection to his answering that question, but I simply want to make the record clear at the start.

Mr. McGinley: Suppose you make the objections, Leo, and I will stipulate that any other objections that you have, that you don't state, are reserved to you until the time of trial. But for the reasons which I have mentioned, and in view of the nearness of the trial date, I think that probably that is the better way to handle it.

Mr. Anderson: Well, it all depends on what your questions go to. As far as this question here is concerned, [85] I have no objection to his answering, outside of the objection I have stated.

The Witness: The question was whether we were alone?

Q. By Mr. McGinley: No. I asked you for the conversation between you and Mr. Leeds on the first occasion when you discussed the application of Mr. Lutz for insurance.

A. It is a little difficult to reconstruct, because we have literally hundreds of those conversations, and I don't remember the exact conversation except that he ap-

(Deposition of Harold Morgan)

proached me, asking if I thought the Company would be interested in entertaining with favor this application on Mr. Lutz. And upon ascertaining the facts from him, I wrote the Company and asked them if they would care to consider this case.

Q. Now, what did Mr. Leeds tell you? You mentioned, in response to my question, that upon ascertaining the facts you wrote the Company. Now, what, as near as you can now recall, did Mr. Leeds tell you?

A. Well, as I recall, some business had been placed in the Equitable, which is Mr. Leeds' company, and additional insurance had been refused. I think that's the story. And being additional business to place, he asked me if I would submit it to the home office to see if they would accept that amount that had been refused by the Equitable.

Q. And what was the amount? A. \$13,000.
[86]

Q. Have you given as near as you can recall all of the conversation that you had with Mr. Leeds?

A. Yes, I think I have.

Q. On the occasion of that conversation, did he hand you an application filled out by Mr. Lutz?

A. I don't remember. My correspondence may help me to answer that.

Apparently not.

Q. And following that conversation, what did you next do with reference to contacting the New England Mutual Life Insurance Company?

A. I wrote them a letter and in this letter I said that there was some history in the case, and as a consequence the local office of the Equitable wired their home office to

(Deposition of Harold Morgan)

turn all papers over to the New England Mutual, and in a wire just received the Equitable stated they would be glad to do so, except they would prefer that our home office make this request of the home office of the Equitable. And I asked them to get in touch with them to secure the necessary papers.

Q. That was about what date, Mr. Morgan?

A. That letter is dated November 16, 1942.

Mr. McGinley: At this time, your Honor, I wish to offer in evidence the letter dated November 16, 1942, from Harold P. Morgan to Mr. Doane Arnold, Manager, Underwriters Department, New England Mutual Life Insurance Company, Boston, [87] Massachusetts. I should state that counsel and I have agreed that there will be no objection to the use of photostatic copies, or that the copies used are not the original documents.

Mr. Herndon: If your Honor please, we object on the ground that the document now offered is already in evidence over our objection, as part of Defendants' Exhibit D, I believe.

The Court: I understand it is already in.

Mr. McGinley: There is a group of letters, your Honor. I believe it included this one, which went in evidence as part of the cross examination of the witness Frost, but in the interest of continuity and completeness, and inasmuch as the document has not been offered separately as an exhibit, I would like to offer the entire exchange of correspondence between Morgan and the home office at this time.

The Court: Let it be marked for identification, and the ruling of the Court, if it is not already in, will be that it just remain for identification. It will be admitted

(Deposition of Harold Morgan)

in evidence if it is already in. It will just remain in for identification.

Q. And did you receive a reply, either by telegram or by letter, in response to your letter of November 16, 1942?

A. Well, I followed it up with a letter to the same [88] party at the home office, dated November 17th, in which I enclosed an application for \$13,000 and an examination by Dr. Waste of the Equitable.

Q. Now, in the letter of November 17th, you say you enclosed what documents?

A. An application completed in the amount of \$13,000 and a medical examination that had been completed by the chief examiner here for the Equitable, Dr. Waste.

Mr. McGinley: At this time, as defendants' and counter claimant's exhibit next in order, we offer in evidence letter dated November 17, 1942, from Harold P. Morgan to Mr. Doane Arnold, Manager Underwriting Department, New England Mutual Life Insurance Company, Boston, Massachusetts.

The Court: Same objection and same ruling, and it may be marked for identification.

Mr. McGinley: May I inquire if counsel will stipulate that the matter commencing on page 11, line 9, to page 12, line 2, be deleted, inasmuch as it refers to the identification of Parts 1 and 2 of the application, and they have already been introduced in evidence.

Mr. Herndon: Yes, I so stipulate.

The Court: The stipulation will be received.

Q. What next was done by you in connection with the application of Abe Lutz for insurance with the plaintiff company? [89]

A. Well, the office received a wire in which the underwriting department advised that the case had been ap-

(Deposition of Harold Morgan)

proved for \$13,000, and that a letter was following regarding additional. In my letter of November 17th I asked them if they would issue additional insurance in the amount of \$13,000.

Q. And do I state the sequence correctly, that in response to your letter of November 17, 1942, you received a wire addressed to Hays & Bradstreet?

A. No. The wire is addressed to New England Mutual Life Insurance Company.

Q. At what address?

A. 609 South Grand Avenue.

Q. And did that wire come to your attention?

A. Yes.

Q. What is the date of that wire?

A. December 1st.

Q. 1942? A. 1942.

Q. After the receipt of the wire on December 1, 1942, what next was done by you in connection with the application of Abe Lutz for insurance with the plaintiff company?

A. Well, I presume that I called Mr. Leeds and told him of the receipt of the wire. The next letter was received by us on December 4th, addressed to Hays & Bradstreet. [90]

Mr. McGinley: At this time, your Honor, I offer in evidence as defendants' and counter-claimant's next exhibit in order, telegram addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue, Los Angeles, from the Underwriting Department. It bears the signature "Underwriting Department", as our next exhibit.

Mr. Herndon: Same objection.

(Deposition of Harold Morgan)

The Court: Same ruling. Mark it for identification next in order, with the understanding that it becomes in evidence if it is not already in.

The Clerk: Defendants' Exhibit H.

Mr. McGinley: Mr. Anderson, I note that Mr. Morgan is refreshing his memory from his office file, and apparently the documents which he has constitute his office file. Is it agreeable to you that in lieu of being furnished with a copy of these documents, that Mr. Morgan read into the record the contents of the telegram and the letters to which I have referred?

Mr. Anderson: I have no objection, except that we may save a lot of time and space here by getting the substance of it, reading into the record the substance of the letters, rather than trying to read these long letters word for word. You can have the whole thing read in if you want to.

(Discussion off the record.)

Mr. McGinley: Then it is stipulated, Mr. Reporter, that as part of this deposition you will have photostatic [91] copies made of the interchange of correspondence and wires referred to by Mr. Morgan, and return the originals to Mr. Morgan and furnish Mr. Anderson and myself with photostatic copies at our expense.

Mr. Anderson: That stipulation is subject to my objection as to materiality, and as to the authority of the witness to testify in these matters.

Mr. McGinley: Yes; all right.

Q. Now, will you kindly turn to the wire of December 1, 1942. I observe that this last mentioned wire, Mr. Morgan, recites that a letter will follow regarding additional, signed "Underwriting Department." Did you

(Deposition of Harold Morgan)

receive a letter from the home office of the plaintiff company subsequent to the wire of December 1, 1942?

A. Yes.

Q. And do you have that letter with you, Mr. Morgan?

A. Yes.

Q. Do you have it in the file which you now have in your hand?

A. Yes.

Q. Would you kindly turn to that letter?

A. Yes.

Q. What is the date of that letter?

A. December 1st.

Q. I may have misunderstood you. I understood you received a wire on December 1, 1942. Did you also receive [92] a letter under the same date?

A. I received the letter three days later, on December 4th. I received the wire—well, I can't tell whether it was a night letter or a fast message, but the wire and the letter are dated the same, December 1, 1942.

Q. I see.

Mr. McGinley: This is awkward, but I don't see how I am going to get away from reading the telegram in, because it serves as a foundation for some questions. With your permission and subject to your objection, Mr. Anderson, I will ask Mr. Morgan to read the letter which he received December 4, 1942, and which is dated December 1, 1942, from the plaintiff company.

Mr. McGinley: At this time, your Honor, as defendants' and counter-claimant's exhibit next in order, we offer in evidence letter from New England Mutual Life Insurance Company, dated December 1, 1942, from the manager of the Underwriting Department.

Mr. Herndon: Same objection.

(Deposition of Harold Morgan)

The Court: That is already in as part of that exhibit?

Mr. Herndon: Yes.

The Court: Same ruling.

The Clerk: I for identification.

The Witness: In its entirety?

Mr. McGinley: Yes. [93]

The Witness: It is addressed to Messrs. Hays & Bradstreet, from Underwriting Department; Subject: Abe Lutz, Policy No. 1172844:

"We have wired you today as per the attached confirmation and wish to advise that we would be willing to consider this risk for \$13,000 of additional insurance subject to new Parts One and evidence of an adequate insurable interest also satisfactory statements from both Dr. Rosenfeld and Dr. Lisner will be required giving full details of their treatment of this applicant in the past."

That letter is signed by an underwriter in the Underwriting Department.

Q. By Mr. McGinley: Mr. Doane Arnold?

A. Well, it is signed by an underwriter. Doane Arnold is the manager of the Underwriting Department. The letter is signed, apparently, by S. L. Hamlin, Underwriter.

Q. Now, after the receipt of the letter which you have just read into the record, did you communicate with Stanley Leeds? A. Yes, I did.

Q. And was that by telephone conversation or written communication?

A. Apparently by telephone conversation.

(Deposition of Harold Morgan)

Q. And what is your recollection as to the date when you talked to Mr. Leeds?

A. We try to handle these things promptly. I most [94] likely talked to him on the 4th of December.

Q. On the telephone? A. Yes.

Q. What was the conversation?

A. I don't recall. I undoubtedly read him the letter.

Q. The letter dated December 1, 1942?

A. Yes.

Q. And what was his response, if any?

A. I don't remember. So many of these things are handled, it is impossible to bring up the specific conversation that we had.

Q. Your present recollection is that you don't recall anything other than what you testified to?

A. That's right.

Q. What next was done by you, Mr. Morgan, in connection with the application of Mr. Lutz for insurance with the plaintiff company?

A. Subsequent letters give some light on our conversations that I had with Mr. Leeds, and that is another reason that it unfolds as we go along.

Q. Feel free to refresh your memory from anything that you have in the file, Mr. Morgan.

A. Yes. Well, I find a letter written to the manager of the Underwriting Department at the home office, dated December 8, 1942, regarding Abe Lutz; subject: Additional [95] insurance; and in that letter I acknowledge receipt of his letter of December 1st; and there was a discussion that the proposed insured's son, Hary Lutz, would be the owner of this additional insurance; and it further indicates that that had been forwarded to the home office on the 7th of December.

(Deposition of Harold Morgan)

Q. In other words, the next step by you was the forwarding of a letter under date of December 8th, 1942, to the home office, after you had talked to Mr. Leeds?

A. Yes, that's right.

Mr. McGinley: At this time, your Honor, as defendants' and counter-claimant's next in order, we offer letter dated December 8, 1942, from Harold P. Morgan to Mr. Doane Arnold, Manager Underwriting Department, New England Mutual Life Insurance Company, Boston, Massachusetts.

Mr. Herndon: Same objection.

The Court: Same ruling.

Mr. Herndon: We might add to the objection that it appears on the face of the offered instrument that it was written subsequent to the date of the issuance of the policy in suit.

Mr. McGinley: Your Honor, apropos of that comment, so that the relevancy of this correspondence may be emphasized, as part of the pre-trial memorandum, the question was raised as to what law would apply, the law of California or the law of some other jurisdiction, and I think counsel and I are in agreement that the law of California should apply. Now, [96] if that is the case, it is bottomed on the fact that the binding contract which is involved in this litigation became a binding contract, not on the date of the issuance of the policy, but the delivery of the policy to the beneficiary or the insured, in California, and the pre-trial stipulation fixed the date of delivery as between the 7th and 9th. Of course, this letter just introduced predates the making of the contract.

The Clerk: This is marked for identification only?

(Deposition of Harold Morgan)

The Court: This same letter was part of that other file which went into evidence, subject to a motion to strike?

Mr. Herndon: Yes, your Honor.

The Court: Same ruling. Mark it for identification. That's what you have been doing with all of them?

The Clerk: Yes.

Q. I observe from just casually reading the December 8, 1942, letter that reference is made to the enclosure of a copy of a form from the Equitable files. Is that correct?

A. Yes. I hadn't gotten down to that paragraph. It indicates that: "We checked closely in connection with the attendance of both Dr. Rosenfeld and Dr. Lisner on Mr. Lutz, and secured a copy from the Equitable files as per form enclosed, herewith. It seems that this comes from Dr. Rosenfeld alone inasmuch as both doctors are in the same office, and the statement, herewith, is the one used by the [97] Equitable, or rather accepted by them, and terse and short as it is, any further statement from Dr. Lisner would, we understand, be a duplicate of the enclosed."

And I asked that after it served its purpose that it be returned to us for the Equitable files.

Mr. McGinley: Your Honor, I heretofore introduced in evidence as part of the cross examination of Dr. Rosenfeld the enclosure that is referred to in the letter of December 8, 1942, just admitted for identification. I make that comment so that the record will be clear.

The Court: You might lodge it with the clerk right here, so there is sequence of this blown-up copy: just have it marked for identification, and on motion it can be substituted, so it will be more convenient for the District to have it before them.

(Deposition of Harold Morgan)

Mr. Herndon: I think the document referred to now is defendants' exhibit B for identification.

Mr. McGinley: That is correct.

Mr. McGinley: Mr. Anderson, there was handed to me by either Dr. Waste or by Mr. Leeds the form of questionnaire which I have just exhibited to you, and for the purpose of further interrogation of Mr. Morgan, to see whether or not this is a copy of the document that is referred to as an enclosure in the letter of December 8, 1942, to the Home Office, I would like to make use of this form subject to all of your objections. [98]

Mr. Anderson: Well, we have a photostatic copy of the original here. It might be better.

Mr. McGinley: You do have a photostatic copy?

Mr. Anderson: Yes.

Q. By Mr. McGinley: Mr. Morgan, directing your attention to the letter of December 8, 1942, do you have a photostatic copy of the form of questionnaire which was enclosed in that letter? A. Yes.

Mr. McGinley: Mr. Reporter, will you kindly mark for identification as Defendants' next exhibit the form of questionnaire which has been handed me by Mr. Morgan from his file.

(The document above referred to was marked by the reporter as Defendants' and Counter-claimant's Exhibit No. 2 for identification.)

Mr. McGinley: Your Honor, may I inquire, in view of the fact that we already have the questionnaire before us, that the matter, commencing line 26, page 18, to line 6, page 19, be deleted, and that on line 8, in referring to defendants' No. 2 for identification, we substituted defendants' B in this action.

(Deposition of Harold Morgan)

Mr. Herndon: So stipulated.

The Court: It will be received.

Q. By Mr. McGinley: Mr. Morgan, directing your attention to Defendants' No. 2 for identification, from whom [99] did you receive the original of which this document is a photostat? A. Stanley Leeds.

Q. And you received that approximately what date?

A. I imagine the same date that I wrote my letter of December 8th.

Q. I think you have already testified to it, but the original of this document was enclosed in your letter of December 8th?

A. That's my recollection, yes.

Q. Now, what next did you do, Mr. Morgan, in connection with the application of Mr. Lutz for insurance in the plaintiff company?

A. We received a letter addressed to Hays & Bradstreet dated December 4, 1942, from the Medical Department, in which the subject is Abe Lutz, No. 1174369, for additional. The letter recites: "We regret that we are unable to consider further without a complete detailed statement from Dr. Rosenfeld and Dr. Lisner. If they jointly attended the applicant and are fully acquainted with the facts, a statement from either may be satisfactory.

"We should like the full details."

And then the following questions:

"Why were the doctors consulted?

"What were the symptoms?

"What were the findings? [100]

"What treatment or advice was given?

"What were the results?

(Deposition of Harold Morgan)

“We are returning to you Dr. Rosenfeld’s statement to the Equitable Life, as requested in your letter of December 8th.”

Q. By Mr. McGinley: And the communication which you have just read is dated December 14, 1942?

A. That’s right.

Q. From the Medical Department of the plaintiff company, and signed by H. M. Frost?

A. It isn’t his personal signature. I don’t know who it is, but there is an initial “M” directly beneath the name “H. M. Frost.”

Q. Now, when you received the letter of December 14, 1942, did you communicate with Mr. Leeds?

Mr. McGinley: At this time, your Honor, as defendants’ and counter-claimant’s next exhibit in order, we offer in evidence plaintiff’s letter dated December 14, 1942, from the New England Life Insurance Company to Hays & Bradstreet, signed H. M. Frost, Medical Director.

Mr. Herndon: Same objection as interposed to the previous offer.

The Court: This exhibit, and Exhibit B, will both be received in evidence, subject to a motion to strike, as explanatory of the testimony of this witness.

The Clerk: Exhibit K. [101]

A. Apparently I did. I see some memorandums in my handwriting on this letter, including a telephone number, which would seem to be Dr. Rosenfeld’s telephone number, and I have written the name of a Miss Byington, and I have some memorandums opposite the questions that were recently read.

(Deposition of Harold Morgan)

Q. And the Miss Byington that you refer to, do you associate her name with the telephone number that is on the memorandum in your handwriting?

A. No, I don't. I frankly can't remember whether this information that I have down here came from her or from Mr. Leeds.

Q. Do you recall who you talked to at the office of Dr. Rosenfeld? A. No, I don't.

Q. Do you associate the telephone number Exposition 1369 as being Dr. Rosenfeld's telephone number?

A. I don't associate it, but it apparently is. It could be verified by the telephone directory.

Q. What is your present recollection as to the conversation that you had with Dr. Rosenfeld's office?

A. I have no recollection of that conversation. As I mentioned before, using the telephone as much as I do, it is impossible to remember specific conversations, and I frankly don't know whether the information that I have indicated is from Dr. Rosenfeld's office or whether it is from Mr. Leeds. [102]

Q. Taking the questions in the order in which you have read from the letter dated December 14, 1942, will you read into the record the information that you obtained in response to those questions?

A. The first question has a memorandum: "Because of requirements of Equitable for B.L.S.U.", which refers to blood sugar.

Q. Could I interrupt you there? That was in response to the question: "Why were the doctors consulted"? A. Yes.

Q. And then in response to the next question: "What were the symptoms"? A. The answer is "None."

(Deposition of Harold Morgan)

Q. And in response to the next question: "What were the findings"? A. The answer is "Neg."

Q. And in response to the question: "What treatment or advice was given"? A. "None."

Q. And in response to the question: "What were the results"? A. "Satisfactory."

Q. The last five responses that you have read in answer to my questions, they all appear in your handwriting, Mr. Morgan? A. Yes. [103]

Q. Is the telephone number "Exposition 1369" and the words "Miss Byington" in your handwriting?

A. Yes.

Q. And your recollection is that you received that information on approximately what date?

A. Well, obviously there is an error in the stamped date of the receipt of the letter at our office. Apparently it hadn't been fixed. But normally these letters come air mail and it takes a couple of days, so I would presume that that was about December 16, 1942.

Q. Then what next was done by you, Mr. Morgan, with reference to the application of Mr. Lutz for insurance in the plaintiff company?

A. In the meantime, I know there were a lot of conversations on the telephone with Mr. Leeds, but the next thing I have here is a copy of a letter dated December 24, 1942, addressed to the Chief Medical Director, Dr. Harold M. Frost of the New England Mutual Life Insurance Company, regarding Abe Lutz. Do you want me to read the letter?

Q. I wonder if you would. It is short.

A. "Dear Mr. Frost:

(Deposition of Harold Morgan)

“Referring to your letter of December 14th in connection with the additional insurance, I would like to give you the story on the case, and it looks very much as if we shall be unsuccessful at this time in securing a statement from the doctor. [104]

“Application was originally made to the Equitable who already had \$33,000 of insurance on this man, and they issued \$10,000 for a total of \$43,000. Additional insurance was wanted, and we issued on our original application \$13,000, which has been delivered and paid for. The additional \$13,000 was ordered without the request of Mr. Lutz, as the Agent hopes to deliver.

“When application was originally made to the Equitable, they asked for a blood sugar test by their Chief Director here, Dr. Waste, but before doing so, Mr. Lutz went to his own doctor, Dr. Rosenfeld, for this test to see if he were alright. He never would have gone if the Equitable hadn't wanted this information. There were no symptoms, the findings were negative, no treatment or advice was given, and the results were satisfactory. He then went to Dr. Waste, and submitted himself to their requirements.

“Under the circumstances, it would be deeply appreciated if our requirements can be waived. We attempted to have the Equitable send you their findings, but for some reason or other the local office advised that this could not be done.”

That completes the letter.

Q. That is the letter dated December 24, 1942?

A. Right.

(Deposition of Harold Morgan)

Q. Now, in the letter which you have just read, referring to the paragraph which states as follows: [105]

“Application was originally made to the Equitable who already had \$33,000 of insurance on this man, and they issued \$10,000 for a total of \$43,000. Additional insurance was wanted, and we issued on our original application \$13,000, which has been delivered and paid for.”

Now, with reference to the original issuance of \$13,000, does that refresh your memory as to when the original policy was delivered to Mr. Lutz?

A. Well, I wouldn't have any idea when it was delivered to Mr. Lutz, because my dealings were all with Mr. Leeds.

Mr. McGinley: At this time, as defendants' and counter-claimant's exhibit next in order, we offer in evidence a letter dated December 24, 1942, from Harold P. Morgan to Doctor Harold M. Frost, chief medical director of the plaintiff company.

Mr. Herndon: Same objection.

The Court: Same ruling. In evidence subject to a motion to strike.

The Clerk: This is L.

Mr. Herndon: I understood the previous ones your Honor had marked for identification. This present one is already in evidence.

The Court: Very well; let it be marked for identification with the understanding, if it is already in evidence it will be subject to a motion to strike. [106]

Q. Is there anything in your file in the way of memorandum or from your Home Office or personal notations that would show what you did in connection with

(Deposition of Harold Morgan)

the original application, if anything, for the \$13,000 insurance referred to in that paragraph?

A. I have no specific recollection, but it undoubtedly would be handled in a routine manner; after it would go through our record, the policy would be handed to me for delivery to Mr. Leeds, the agent.

Q. You have with you the interchange of correspondence with your home office relative to the issuance of the original policy for \$13,000?

A. Well, we have quoted from it. It is here. I think the letter that has been read into the record of November 16th and the letter of November 17th.

Q. Well, directing your attention, then, to the letters of November 16th and November 17th, is there anything in their contents which would enable you to refresh your memory as to what you did in connection with the original application for \$13,000?

Mr. Anderson: I think that was covered in a previous question, if I remember.

The Witness: What I did with the original application? I think I answered that that the application was transmitted to Boston, our Home office.

Q. By Mr. McGinley: With reference to the original [107] application for \$13,000, did you forward to the Home Office the original of defendants' for identification No. 2?

Mr. McGinley: Off the record.

(Discussion outside the record.)

Mr. McGinley: Mr. Reporter, I am handing you as Defendants' next exhibit for identification, a photostatic copy of the policy furnished me by plaintiff's counsel.

Mr. McGinley: May I inquire if counsel is willing to stipulate as to the policy which was handed to the witness

(Deposition of Harold Morgan)

at this time, in the deposition, was the policy which is in suit in this case?

Mr. Herndon: Yes, so stipulated.

The Court: It will be received.

Q. By Mr. McGinley: Mr. Morgan, to clarify the policies that are referred to in the correspondence concerning which you have given testimony, I am handing you a photostatic copy of a policy issued by the plaintiff company on the life of Abe Lutz, which bears the date of issue October 13, 1942, and is assigned policy number 1,172,-844, and ask you this question: Is this the policy that is referred to in the last letter, dated December 24, 1942?

A. The letter of December 24, 1942, refers in the second paragraph to original policy of \$13,000, which bears policy No. 1,172,844.

Q. And is this the policy, Defendants' Exhibit 3 for identification, that is referred to in the second paragraph [108] of the letter dated December 24, 1942?

A. Yes.

Q. All right, then, continuing with the letter of December 24, 1942, what next was done by you, Mr. Morgan, in connection with the application for insurance by Abe Lutz in the plaintiff company?

A. Well, I waited to get a response to that letter of December 24, 1942.

Q. And did you receive a response?

A. Yes. It was in the nature of a telegram dated December 29, 1942.

Q. From the Home Office?

A. From the Home Office, and addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue: "Abe Lutz regret that there is no

(Deposition of Harold Morgan)

change in our requirements." Signed "New England Mutual Life Insurance Company."

Q. And what did you next do?

A. Apparently that information was transmitted to Mr. Leeds.

Q. About December 29, 1942?

A. I imagine so.

Mr. McGinley: As defendants' and counter-claimant's exhibit next in order we offer telegram addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue, Los Angeles, California, from New England Mutual Life Insurance Company. [109]

Mr. Herndon: Same objection.

The Court: Same ruling. Let it be marked for identification.

The Clerk: Defendants' Exhibit M.

Q. And then what next did you do?

A. The next thing I find is a letter dated January 14, 1943, addressed to Hays & Bradstreet, from the Medical Department, subject: Abe Lutz, Policy 1174369, and the letter reads: "We regret to advise that we are today removing this case from our pending file. We feel that sufficient time has now elapsed since our request for an attending physician's statement. We are, therefore, marking the application as incomplete and placing it in our closed file. Yours very truly, F. R. Brown, Associate Medical Director."

Q. That is dated January 14, 1943?

A. Yes, and it was apparently received by us on January 18, 1943.

(Deposition of Harold Morgan)

Q. And following the receipt of the letter of January 14, 1943, did you communicate its contents to Mr. Leeds?

A. I most likely did. I have no definite recollection of a specific telephone call.

Mr. McGinley: If your Honor please, the defendants and counter-claimant offer as the next exhibit in order, in evidence, letter dated January 14, 1943, from New England [110] Mutual Life Insurance Company, from F. R. Brown, Associate Medical Director.

Mr. Herndon: Same objection.

The Court: Same ruling. Mark it for identification.

Q. Now, was your conversation communicating what in substance was a rejection of this additional application for \$13,000 life insurance for Abe Lutz in the plaintiff company the last episode in connection with this matter?

A. As far as I know, yes.

Q. Now, I note, Mr. Morgan, referring to the letter dated January 14, 1943, that the policy concerning which that advice was given, to-wit, in substance their rejection, refers to policy No. 1174369. That is correct, isn't it?

A. Yes. That's the original policy.

Q. Yes. Now, the policy, Defendants' Exhibit 3 for identification, that had been previously issued, bore policy No. 1172844; is that correct? A. Yes.

Q. So that the interchange of correspondence commencing with the date—strike that question.

To which policy does the letter dated November 16, 1942, refer? Policy No. 1172844 or Policy No. 1174369?

A. The first numbered policy.

Q. And to which policy does the letter dated November 17th refer? [111]

Mr. Anderson: You are asking the question on the basis of the reference made in the letter to a policy num-

(Deposition of Harold Morgan)

ber, not as to whether they are talking about this policy or the other policy?

Mr. McGinley: I am asking Mr. Morgan to which policy the correspondence refers, where they don't identify it by number, because it is apparent now, Mr. Anderson, that there was an original policy number 1172844 issued and dated in accordance with an arrangement with the insured, October 13, 1942, and then an additional application for \$13,000 was made and that was rejected.

Mr. Anderson: Well, my only point is that there having been no second policy numbered at the time that correspondence was going on, the only reference they could make would be to the original policy.

The Witness: There had not been any policy number assigned on November 17, 1942; there had not been time because the application was only submitted on that date.

Q. By Mr. McGinley: On November 16th?

A. November 16th and November 17th—no. November 17th. "I am now pleased to enclose an application."

Mr. McGinley: Off the record.

(Discussion outside the record.)

Q. By Mr. McGinley: Now, let me ask you this: Confining your answers to questions directed solely to Policy No. 1172844, date of issue October 13, 1942, what [112] documents were forwarded by you, Mr. Morgan, to plaintiff company prior to the issuance of that policy?

A. An application for the policy.

Q. And that you have testified as being the original of Defendants' Exhibit 1 for identification?

A. Right.

(Deposition of Harold Morgan)

Q. Now, in addition to the application, Defendants' Exhibit 1 for identification, did you also forward to plaintiff company prior to the issuance of Policy No. 1172844 the original of Defendants' 2 for identification?

Mr. Anderson: Having in mind the policy was issued December 1st.

The Witness: No. That Defendants' Exhibit 2 was apparently forwarded after the original policy had been received. The letter of transmittal indicates it was forwarded on December 8th.

Q. By Mr. McGinley: Then using those two dates as a guide post, December 1, 1942, and December 8, 1942, when was policy No. 1172844 issued, if you know, by plaintiff company?

A. I don't know the exact date. It would have been between those dates. I presume, from the telegram and the letter dated December 1, 1942, that that was the date the policy was actually issued in Boston.

Q. What would be the date, again?

A. December 1, 1942. [113]

Q. The policy, No. 1172844, was forwarded by the plaintiff company to you in Los Angeles for delivery to Mr. Leeds, was it not? A. That's right.

Q. And you did deliver it to Mr. Leeds?

A. Yes.

Q. Is there anything in your file or independent of the file that fixes the date that you delivered the policy to Mr. Leeds?

A. There may be a date on our office ledger card, which is a permanent record, and for bookkeeping purposes kept, of course, in our office.

(Deposition of Harold Morgan)

Q. From your testimony here, Mr. Morgan,—and I merely ask this in the interest of completeness—is it your statement that Policy No. 1172844 was issued by plaintiff company and delivered by you to Mr. Leeds before you contacted Dr. Rosenfeld's office?

Mr. Herndon: We object to this question (page 31, line 25, to page 32, line 3), your Honor, on the ground that it is assuming facts not in evidence, in that the witness did not testify that he called Doctor Rosenfeld's office, but did not remember whether he called Doctor Rosenfeld's office or not, or whether he got the information which he noted in his notations on the exhibit, from Mr. Leeds.

The Court: I think that is true; let us have that statement without prejudice, inasmuch as the man is not here. [114] Read that question again.

(Mr. McGinley reading.)

From your testimony here, Mr. Morgan—and I merely ask this in the interest of completeness—it is your statement that Policy No. 1172844 was issued by plaintiff company and delivered by you to Mr. Leeds before you contacted Doctor Rosenfeld's office?

The Court: Suppose you change that question and say "before the circumstances about which you have testified in connection with the possible contact with Doctor Rosenfeld's office"?

Mr. McGinley: I will ask that the question then be amended by the Court's language, your Honor.

The Court: Very well. Now, you may read the answer.

A. Yes, because the letter you refer to is dated December 14, 1942, and my recollection is that the entry went

(Deposition of Harold Morgan)

through our bookkeeping department on December 9, 1942, indicating that we received payment of the premium on this policy, 1172844, approximately that date; that is, December 9, 1942.

Q. To your knowledge what information did the plaintiff company have with reference to the health and physical condition of Abe Lutz, prior to the time that it issued Policy No. 1172844?

Mr. Anderson: He is not qualified to answer that [115] question.

Mr. McGinley: Well, limit it to his knowledge. I know he doesn't know what the medical director did.

The Witness: Only the copy of the examination from Dr. Waste.

Q. By Mr. McGinley: And that is Defendants' Exhibit 1 for identification? A. Right.

Q. And the obtaining of defendants' Exhibit 2 for identification was in connection with a consideration of the additional application for insurance, which was rejected? A. Right.

Q. Prior to the issuance of the original policy, No. 1172844, did you contact Dr. Waste with reference to obtaining a report on the health and physical condition of Abe Lutz?

A. I have no recollection of so doing, no.

Q. In connection with the additional application, which was assigned policy number 1174369, did you act or communicate with Dr. Waste relative to the health and physical condition of Mr. Lutz?

A. Not to my recollection, no.

Q. Your inquiry relative to the health and physical condition of Abe Lutz was confined to the conversation

(Deposition of Harold Morgan)

as borne out by your personal memorandum on the letter dated December 14, 1942? [116] A. Yes.

Q. Now, the card index or office records that you referred to in answer to one of my questions concerning the issuance of Policy No. 1172844 would show the date of the payment of the premium?

A. It would show the date that it went through our books.

Q. I understand from your testimony that that date would coincide with the date of the delivery of the policy to Mr. Leeds? A. Yes.

Mr. Anderson: You mean coincide or be approximate?

Mr. McGinley: Approximately.

Q. Now, when—refresh your memory from any of your memorandum, Mr. Morgan—for the first time was the matter of an additional policy for \$13,000 brought up?

A. It is referred to first in my letter of November 17, 1942.

Q. Would that refresh your memory that in your original conversation with Mr. Leeds he mentioned one policy for \$13,000, and if that was issued he wanted an additional policy for \$13,000?

A. I don't know. The original letter of November 16, 1942, only mentioned the case, and there was no specific mention of any amount in the letter of November 16, 1942.

Q. What is your independent recollection as to when [117] the conversation concerning the additional \$13,000 policy occurred?

A. I have no recollection, no definite recollection of it. The letter would indicate that it was November 17, 1942.

(Deposition of Harold Morgan)

Q. Mr. Morgan, during your ten years of experience in the insurance business in the manner in which you have testified, are you familiar with the custom and usage of insurance companies in the City of Los Angeles, relative to investigating the health and physical condition of an applicant for insurance, prior to the issuance of the policy?

Mr. Herndon: If the Court please, plaintiff objects to that question (page 34, lines 18 to 23), upon the ground that no proper foundation has been laid to qualify the witness to testify as an expert on the subject matter inquired about.

The Court: Of course, this is the statement by counsel as to whether or not he is qualified. I presume if he said yes, he is subject to voir dire to determine what is the background in the answer.

A. Well, there is a certain routine procedure followed—

Mr. Anderson: Well, I don't believe that he is qualified to make any statement on that subject, to have a binding effect on any company here.

Mr. McGinley: Can we do this, Leo. make your objection and allow him to answer? I am just about through.

Mr. Anderson: Well, as far as I am concerned, I would ask Mr. Morgan not to answer it, because I don't think it would have any bearing on this case, or should even be thrown into it by deposition or otherwise.

Mr. McGinley: Well, then, you are instructing him not to answer the question?

Mr. Anderson: I am asking him not to. He is not my witness.

(Deposition of Harold Morgan)

Q. By Mr. McGinley: All right, will you answer the question, Mr. Morgan? As I understood you, you started to say there was a certain routine that you are familiar with; is that correct?

A. Well, it is automatic that we request a retail credit inspection on an application that is submitted to the company.

Q. And that retail credit inspection, I assume, is confined to the financial stability of the applicant; is that right? A. We don't see those reports—

Mr. Anderson: Same objection.

Q. By Mr. McGinley: Other than the obtaining of a financial or credit report on the applicant or the beneficiary, is it not a fact, Mr. Morgan, that there was in effect in Los Angeles, during the year 1942 a custom and usage among insurance companies to contact or communicate with [119] physicians or surgeons who had been listed by an applicant on the formal application, to determine directly from such physicians or surgeons the health, physical condition and treatments given to any applicant who applies for insurance?

Mr. Anderson: Same objection to that on all the grounds that we have set forth in the record here, which I understand have been reserved to all these questions.

Mr. McGinley: That is satisfactory.

Mr. Anderson: And on the further ground that I know from past experience that is not the custom.

Mr. McGinley: Well, you know more about the insurance business than I do, and I am asking an expert here what is your testimony, Mr. Morgan?

Mr. Anderson: He is not qualified as an expert. That's the reason I am making the objection.

(Deposition of Harold Morgan)

Mr. McGinley: Well, if your objection is good, Leo, it is as good on the date of the trial as it is now, and it is to save us from going up there—

Mr. Anderson: I don't see any percentage, John, in going into a lot of stuff in this deposition that has nothing to do with the case. That is why I am asking Mr. Morgan to refuse to answer.

Mr. McGinley: You understand my theory; I think it is admissible, Leo. But you and I are not going to decide any questions of law here.

Mr. Anderson: Submit it to the Court, if you want [120] to go into that, and get a ruling on it.

Mr. McGinley: All right. Let's have the record clear, then.

Mr. Reporter, will you ask the last question of Mr. Morgan so that we can have the record clear?

(The question was read by the reporter.)

The Witness: I refuse to answer that question.

Q. By Mr. McGinley: And your refusal to answer is on the advice of counsel?

A. I am not qualified to answer the question.

Q. When you say you are not qualified, you mean by that that you do not know whether such a custom exists, or that you feel your experience is such that you are not competent to answer it?

A. I feel that I am not competent to recite procedure on the part of insurance companies.

Q. So that I might be informed, Mr. Morgan, in connection with the original Lutz application, without my mentioning the policy number, from whom do you receive compensation for such services as you rendered in that regard?

A. Hays & Bradstreet.

(Deposition of Harold Morgan)

Q. And, if you know, for the services that you rendered in connection with the first application, does the plaintiff company pay Hays & Bradstreet any compensation?

A. They may pay them compensation, but I don't know the answer to that question. [121]

Q. Did you receive any compensation for the services you rendered in connection with the original Lutz application from Mr. Leeds?

A. Did I receive any compensation from Mr. Leeds?

Q. Yes. A. No, I did not.

Q. The compensation that you received was from Hays & Bradstreet? A. That's right.

Q. And you do not know whether or not plaintiff company paid Hays & Bradstreet any part of the premium paid by Mr. Lutz for the services that you rendered in connection with the original policy?

A. I don't know what their basis of compensation is.

Q. Well, from your experience, such as you have recited, in the insurance business, do you receive compensation for your services from the insured or the insurance company? A. From the general agent.

Q. And does the general agent receive compensation for the services that it renders from the insured or the insurance company?

Mr. Anderson: He just answered that. He said he didn't know.

Mr. McGinley: Well, I think he does know. I mean if he wants to say he doesn't know, it is all right. [122]

The Witness: They can't operate without some kind of compensation, but I said that I don't know the basis of the compensation. They must receive compensation from the insurance company to operate an office.

(Deposition of Harold Morgan)

Q. By Mr. McGinley: And you don't recall the percentage of compensation?

A. I am not in the firm, you see. I don't know the basis of compensation.

Q. You are employed on a salary, Mr. Morgan?

A. I am on a salary, yes.

Q. And you are not a partner?

A. I participate in profits, but I am not a partner.

Q. I see.

Mr. McGinley: Let the record show the following interchange of correspondence and wires may be grouped together as one exhibit for identification, being Defendants' next in order: A letter dated November 16, 1942, from Hays & Bradstreet to Mr. Doane Arnold; a letter dated November 17, 1942, from Hays & Bradstreet to Doane Arnold; a telegram dated December 1, to New England Mutual Life Insurance Company, 609 South Grand Avenue; a letter dated December 1, 1942, to Hays & Bradstreet from New England Mutual Life Insurance Company; a letter dated December 8, 1942, to Mr. Doane Arnold from Mr. Morgan; a letter dated December 14, 1942, to Hays & Bradstreet from New England Mutual Life; a letter dated December 24, 1942, from Hays & [123] Bradstreet to plaintiff, to New England Mutual Life; a telegram dated December 29, 1942, to New England Mutual Life, 609 South Grand Avenue; and a letter dated January 14, 1943, to Hayes & Bradstreet, from New England Mutual Life.

(The documents above referred to were marked by the reporter as defendants' and counter-claimant's Exhibit No. 4 for identification.)

(Deposition of Harold Morgan)

Q. By Mr. McGinley: Mr. Morgan, during the year 1942, especially during the months of November and December, 1942, you were supplied, were you not, with a form of questionnaire by plaintiff company similar in form and contents to that which has been identified here as Defendants' Exhibit 2 for identification?

Mr. McGinley: May I inquire if counsel is willing to stipulate that the reference to defendants' exhibit 2 in question is in reference to defendants' exhibit B in evidence?

Mr. Herndon: Yes, I so stipulate.

The Court: Very well.

A. Well, the correspondence would indicate that Exhibit 2 is a photostatic copy of the original form which I had sent in to our Home Office.

Q. Yes, but Exhibit 2 is the form of questionnaire used by another insurance company, the Equitable Life Insurance Company. My question is directed to the fact that the New England Mutual Life Insurance Company, during the year 1942 and especially during the months of November and [124] December, 1942, had their own form of questionnaire, similar in substance and form to the one you now have in your hand?

A. Well, we use a form, but if you are asking a specific question whether or not we had a form on this case, I don't remember one.

Q. Do you have with you the form of questionnaire that is used and was used by the New England Mutual Life during the months of November and December, 1942?

A. I don't happen to have one with me, no.

(Deposition of Harold Morgan)

Q. You do have a supply in your office, do you not?

A. In our office, yes.

Mr. McGinley: May it be stipulated, Mr. Anderson, subject to all of your objections, that when the deposition is written up there be attached thereto and marked as Defendants' next exhibit for identification the form of questionnaire used by the New England Mutual Life Insurance Company?

Mr. Anderson: No. That will be settled Monday.

Mr. McGinley: That is probably right. May I make this suggestion, so that we won't have to continue this deposition to have Mr. Morgan come back solely for that one reason, that if the Court rules favorably on my contention on Monday, that the form of questionnaire be attached to the deposition when it is signed by Mr Morgan?

Mr. Anderson: I don't know what they may have in the way of forms over there. I don't know that what they [125] have there would be what they had in 1942. In other words, if the Court orders that we let you have a copy of any form, we will secure the form and furnish it to you, and it won't have anything to do with this deposition.

Mr. McGinley: Well, that is satisfactory. If the ruling is favorable Monday to my contention that it is competent and material, without the necessity of calling Mr Morgan, you will sent me over a photostatic copy or a copy of the form of questionnaire that was used by the New England Mutual Life during the months of November and December, 1942.

(Deposition of Harold Morgan)

Mr. Anderson: We will comply with whatever the Court orders.

Mr. McGinley: All right. Now, there is only one thing left, and that is the refusal of the witness to answer the question as to the usage and custom.

Mr. Anderson: He finally answered it. He said he didn't know.

Mr. McGinley: I think it went deeper than that. I think he said that he wasn't competent. Of course, that is his opinion and conclusion.

Mr. McGinley: At this time, your Honor, as defendants' and counter-claimant's exhibit next in order, we offer in evidence a copy of the attending physician's statement of the New England Mutual Life Insurance Company. It is a blank form.

Mr. Herndon: Plaintiff objects to the offer on the [126] ground that it is incompetent, irrelevant and immaterial in that it is a blank form, and contains nothing, and therefore has no tendency to prove any fact in issue in this case.

Mr. McGinley: My purpose in offering that, your Honor, is on this theory: One of the defenses to this suit is bottomed on waiver, and, additionally, on estoppel. Now, estoppel and waiver, or the evidence which will make out estoppel and waiver, depends in this case on matters that were not done, as well as matters that were done. One of items of proof which go to a showing that the plaintiff, insurance company, failed to do that which the law required him to do, was to contact Doctor Rosenfeld when the name was listed on the application. Under the authorities the ease with which information, later claimed to be material, may be obtained is an item of

(Deposition of Harold Morgan)

proof, and this blank form is offered to show that at the critical time in question, plaintiff company at its home office in Los Angeles, was furnished with the name of the doctor, the telephone number, and it could have obtained in that form evidence or information that has been introduced here through Doctor Rosenfeld, which is now asserted to have been withheld from it before the policy was issued.

The Court: I think possibly your objection is largely to the weight to be given to it. Certainly it is a matter of common knowledge that insurance companies have forms for such a contingency, and certainly that would not be denied by [127] plaintiff's counsel. I think that is about all that this can possibly prove, and I think undoubtedly counsel will stipulate that the New England Mutual undoubtedly had forms to take the statements of attending physicians, if they wanted them, and that those were available to anyone who needed them in the City of Los Angeles. Do you so stipulate?

Mr. Herndon: Yes, your Honor.

Mr. McGinley: I accept the stipulation.

The Court: I don't think this is of any particular value to us. It can be marked for identification. Let it go at that.

The Clerk: Defendants' Exhibit O.

Mr. McGinley: Reserving the right to have that question answered, that's all the questions I have.

Mr. Anderson: I have no questions.

(Deposition of Harold Morgan)

Mr. McGinley: Let the record show, then, that with the exception of having and reserving the right to have the witness answer as to the custom and usage, in the respect which I mentioned, that we have no further questions at this time. And after I read the deposition, I may want to have Mr. Morgan cited to answer that question. Don't close the deposition.

Mr. McGinley: That concludes, your Honor, the reading of the deposition under the circumstances which we have indicated. [128]

The Court: I am taking the liberty, under the extraordinary circumstances, to make some slight modifications in questions in order to make them available. I think there were only two or three of those, and as I understand it, the modifications were satisfactory in order that whatever there was in the answer of materiality could be received.

Mr. Herndon: Yes.

The Court: May it be so stipulated?

Mr. McGinley: So stipulated.

(Short recess.)

Mr. Herndon: If your Honor please, with reference to the testimony of Mr. Morgan, which has just been read, may it be understood, in view of the fact that it was taken subject to our objections, and motions to strike, that the motions to strike may be made at the conclusion of the case?

The Court: Yes.

[Endorsed]: Filed Oct. 31, 1945. [129]

[Title of District Court and Cause.]

Honorable Ralph E. Jenney, Judge Presiding

TRANSCRIPT OF COURT'S OPINION

May 4, 1945

Los Angeles, California

Appearances:

For the Plaintiff: McLaughlin & McGinley, by John P. McGinley, Esq., and W. L. Baugh, Esq.

For the Defendants: Meserve, Mumper & Hughes, by Roy L. Herndon, Esq., and Leo P. Anderson, Esq.

Los Angeles, California, Friday, May 4, 1945,
10:00 o'clock

The Court: We will take up the matter of New England Mutual Life Insurance Company v. Lutz, with particular reference to the plaintiff's and defendants' motions to strike from the evidence. I shall take up, first the defendants' and I will take them right on down so that it will be easier for you to keep track of them as they appear in the motions to strike the testimony and evidence, filed on April 3, 1945, at 3:19 p. m.

The first motions are directed to the evidence of H. Ludden, or Luden, whom, you will remember, was the pharmacist who appeared and testified as to certain facts connected with the filling of prescriptions for Abe Lutz and as to certain conversations which were had between the pharmacist and the decedent at the time that the prescriptions were filled. The testimony of the witness Ludden, as I understand it, was admitted only for the purpose, and for the limited purpose, of showing knowledge on the part of the deceased and that that was so understood at the time the evidence was admitted. It

seems to the court that this evidence is clearly admissible as declarations against interest binding upon the defendant; also, because of his privity with the insured and as a party to the contract. They are oral statements of pain and suffering which go to show the insured's familiarity with and knowledge of his [2] physical ailments.

We have here, also, a rather unusual situation as revealed by the evidence. The son of the insured, the defendant Harry Lutz, apparently arranged for the insurance. It was gotten up by a man who lived next door to him and he was thoroughly familiar with the details of it and, as I understand it, he paid for it also and he was made the beneficiary.

The motions in connection with the testimony of Ludden, 1 to 29, both inclusive, including the direct and cross and redirect, are all denied.

30 is, likewise, denied. In addition to the other observations, this motion is too general and sweeping in scope to be of any value.

As to the testimony of Martha Tucker, which comes next in order, it is the court's understanding as to this testimony that it was introduced for the sole purpose of laying a foundation for the introduction of plaintiff's Exhibit 8, which consists of certain records of the Cedars of Lebanon Hospital concerning the decedent Abe Lutz, and at the time that it was offered it was indicated by counsel that it was so limited. These records were attempted to be introduced by plaintiff under the so-called "shop book rule." There is some confusion in the decisions with respect to the admissibility of hospital records under this "shop book rule." This uncertainty, I think, was somewhat exaggerated after the de- [3] cision of the United States Supreme Court in the case of Palmer

v. Hoffman, 318 U. S. 109. The latest case on the subject apparently was decided by the United States Court of Appeals for the District of Columbia on May 8, 1944, *New York Life Insurance Co. v. Taylor*, originally in 143 F. (2d) 14. The written decision was withdrawn from the bound volume and the opinion on the re-hearing appears in 147 F. (2d) 297, at which point appear both the original opinion and the opinion on the re-hearing. Whether or not this court is in accord with the majority opinion in that case is beside the point. We have here a somewhat different situation. The evidence of value to the court in these records of the Cedars of Lebanon Hospital is largely cumulative, the facts having been testified to by Dr. Rosenfeld et alia. Under the circumstances, we feel disposed to strike all the testimony of Martha Tucker, all the testimony of Lillian Duncan, Exhibit No. 8, which was the records of the Cedars of Lebanon Hospital concerning Abe Lutz, the insured, Exhibit No. 23, which was the evidence of certain clinical records of the Sansum Clinic concerning said Abe Lutz, the deposition of Freeman P. Spinney, Exhibit No. 24, and the deposition of Dr. H. M. Benning, Exhibit No. 25. The last two mentioned exhibits were offered, as we understand it, for the sole purpose of laying the foundation for the admission of Exhibit No. 23. We are frank to say that we are in ac- [4] cord with the decision in the *New York Life Insurance Co. v. Taylor* case to the extent that it declines to receive diagnoses, which, under the circumstances, seems to me to be dangerous. They may be speculative; they may be self-serving; they may be a good many things which would make the receipt of such testimony dangerous and the court should require a better type of evidence. We believe that, under the circumstances here indicated, the history revealed by the

insured might well be considered admissible under the heading of "knowledge" and declarations against interest. If all of the other foundations are properly laid and the testimony in the background is properly before the court, it is a little bit difficult to see why the record, properly kept in accordance with the rules, and the statement made by the decedent indicating familiarity with and knowledge of his physical condition, should not be admitted. I am a little bit sorry that these decisions haven't been a little bit more clear-cut along that line. Inasmuch, however, as the evidence is merely cumulative, and inasmuch as there is some apparent confusion in the decisions, the court has decided to exclude it. There being no jury present, we feel that the court should be permitted to select the evidence upon which it will rely.

As to the testimony of Henry H. Lissner, this testimony was apparently offered only for the purpose of further identifying Exhibit No. 8 and for the purpose of showing the authorship of certain entries which were otherwise proved. The testimony is, therefore, stricken and the motion granted in that regard.

As to the testimony of Maurice H. Rosenfeld, the court feels that, generally speaking, the testimony of this witness was properly received in evidence. This testimony is objected to on the ground of privilege and on the further ground, generally speaking, that it is hearsay. The testimony limits the information obtained by Dr. Rosenfeld from the deceased to that period of time prior to November 16, 1942. It is, likewise, the court's view that privilege has been waived.

However, the answers to certain specific questions should be stricken. Motion No. 1 as to page 47, lines 13 to 15, and at line 17, should be and is granted.

Motions 3 to 98, both inclusive, in connection with that testimony, are denied.

It will be noted that the testimony indicated under objections 17 and 18, 30 and 31, were all, like similar questions, revealed to the patient, and the doctor testified in effect as to what he told the patient. I think there is sufficient background to indicate that as a proper finding.

The electrocardiograms, Exhibits 12, 13, 14, 15, 16, 17, and 18, are admitted only for the purpose of explaining [6] the testimony of Dr. Rosenfeld. It is our understanding that each of these electrocardiogram exhibits was made under the orders of Dr. Rosenfeld and in connection with his examination. In connection with objections 17 and 18 as to the report of the eye specialist, Dr. Stephen Seech, it will be noted that Dr. Rosenfeld testified as to what he told the decedent about this report of Dr. Seech, and it is limited in its admissibility in that manner.

The motion to strike No. 99 is too general in nature to be of value and is, therefore, denied.

As to the testimony of Paul M. Arnold, the court feels that the waiver of decedent contained in the application predicated upon which the policy was issued is an effective waiver as against the defendant, Harry Lutz, upon the ground of privilege. The court further believes that Exhibit No. 20 is admissible for the purpose, in connection with other evidence, of proving that the defendant, Harry Lutz, had waived the privilege and was estopped to assert the objection of privilege. Therefore, the motion of defendant as to plaintiff's Exhibit No. 20 is denied.

As to the testimony of Freeman P. Spinney, being in the form of a deposition, this testimony was introduced, as we understand it, for the sole purpose of laying the

foundation for the introduction of the hospital records of Sansum Clinic. On account of the views heretofore expressed in connection [7] with that matter, the deposition is stricken and motions 1 and 2 of defendant, under the heading of "Spinney," are granted.

On the testimony of Stephen G. Seech, it will be noted that the testimony of the witness Dr. Seech relates to occurrences prior to November 16, 1942. We believe that any proper objection is to the weight to be given to this testimony and not to its admissibility, and what weight the court will give it is a matter for consideration by the court. While the statement of Dr. Seech is not too specific, the court believes that Dr. Seech testified that he told substantially everything about which he testified, to the decedent, that is, the material parts of his findings as indicated in Volume 2, page 41, line 18, of the testimony. With that limited understanding, it will be received.

Motions 1 to 15 to strike, under the heading of "Seech," are denied. No. 15 is denied as being too general.

As to the testimony of Preston B. Brown, the motions to strike under this heading are all denied. While we believe, as heretofore indicated, that the deceased and defendant, Harry Lutz, both waived the privilege, we believe that this evidence is admissible for the limited purpose of showing the attitude of defendant in connection with this question of privilege and for that purpose only. They are so limited. [8]

As to the testimony of Lillian Duncan, the motions directed against this testimony are all granted because of our previous view as to the records of Cedars of Lebanon Hospital.

As to the testimony of H. M. Benning, on account of our view as to the admissibility of the hospital records,

the testimony of H. M. Benning in connection therewith is stricken.

Plaintiff's Exhibit No. 21 is, likewise, stricken, as are also Exhibits Nos. 22 and 23.

As to the deposition of Dr. Harold M. Frost, Interrogatory No. 31 was objected to during the trial and it now is the subject of a motion to strike. The motion is denied.

The motions as to Interrogatories Nos. 32 to 37, both inclusive, are each denied.

The motion to strike the answer to Interrogatory No. 45 is denied as it is indicated in the answer to Interrogatory No. 12 that the New England Mutual Life Insurance Company of Boston followed the general practice.

The motion to strike the answer to Interrogatory No. 46 is denied.

Objection No. 9 to the testimony of Dr. Frost is denied as being too general.

As to the testimony of John M. Waste, the motions in connection with this testimony are denied. [9]

As to the objections or motions to strike of the plaintiff, here, again, we have a rather unique situation. The federal rules, in effect, provide that, if evidence is admissible for any purpose, it should be received so that the record may be complete before the Circuit Court of Appeals or any other court that may have an interest in it or may be complete before the trial court.

Just speaking informally, we have this situation. The defendant pleads, what we might describe as, certain affirmative defenses. The plaintiff, to insist upon its rights, pleads estoppel. The defendant has rather a hard job on his hands. That is always true. The attorney for the defendant wants to protect his client's interests. He does not know just how far he is going

to be able to get but he is professionally and morally obligated and certainly he desires to do everything he can to protect his client's interests and find out what there is there. He may have to go on somewhat of a fishing expedition but, after all, quite frequently he gets a lot of information that is of value and he has to do so. Sometimes it is of great benefit to him and sometimes it doesn't do him any good. It is just innocuous, as sometimes it helps the other fellow. That is the chance a lawyer and a defendant always have to take.

Here the court is asked to permit the evidence to go in and it is objected to on the ground that it is immaterial. [10] How is the court going to know whether it is going to be material or is not going to be material? It can't tell at the time. He lets it go in and then it is subject to a motion to strike and the court is charged with the responsibility of meeting those issues.

Let's just pick out an item to illustrate what I mean. The contention of defendant, stripped of all of its technicalities and all of its verbiage in one regard, is that the decedent, the insured, was Yiddish, was Jewish, read Hebrew but didn't read English well, and that he signed something he didn't understand and, therefore, in all good conscience, he should not be bound by it. The evidence perhaps discloses that here was a shrewd business man. He had accumulated a fortune of a half a million dollars. He had an income of approximately seventy-five to one hundred thousand dollars a year, indicating that he was a pretty shrewd, careful, intelligent, business man.

The evidence also showed, by lawyers who had served him, that he didn't read documents but he understood them when they were read to him, and he always had important documents read to him. The lawyers testified that, when they did anything for him, they read the

documents to him or that someone came in and read them to him and then he exercised his judgment predicated upon what he heard.

That is one phase of the matter. Maybe the testimony [11] doesn't establish a case for the defendant. Maybe it favors the plaintiff. But should I strike it?

Let's take the testimony as to this correspondence involved in these applications currently before the court and the testimony with regard to other insurance. The position of the defendant is that all of the information was before the plaintiff insurance company or, if it wasn't, it should have been; that it was their business to pry loose information because they were placed on guard by some of the answers in the applications. I am not attempting to speak too technically. I am just speaking generally. The position of the insurance company is, "Well, we were satisfied to take a chance for \$13,000 predicated upon knowledge we had. We were not bound to go out and do anything more. We were willing to take that chance and we had a right to rely upon what we were told. But, if we were going to take on any heavier load, we were going to have to have additional information." These are serious matters and they might affect different judges in different ways. Each judge certainly should be permitted to see what is behind all these charges or claims and then determine what weight he is going to give to them.

I think, also, that there is good sense and safety in the ultimate objective of all courts to do justice in letting evidence in where it seems admissible under any theory. [12]

The objections of plaintiff, that is, the motions to strike of plaintiff, as indicated in the written memorandum filed on April 3rd, entitled "Plaintiff's Motion to Strike Evi-

dence from the Record," Nos. 1, 2, 3, 4, 5, 6, and 7, are all denied.

Now, gentlemen, you are in a position to do any arguing that you want to and file any briefs that you want to. I don't believe that we need to take the time for any oral argument. That is my own view. I have followed this evidence with particular care. I have read these transcripts, the evidence, and am very familiar with them from the standpoint of an examination necessary to arrive at a conclusion on these motions to strike. I can't guarantee that I am right and you gentlemen, of course, can't guarantee I am wrong. All I can do is to do the best I can under the circumstances. Some other court will have to determine it. My view of the matter, after the most careful examination of all of the cases, is that the rules are correct. The law is not a hundred per cent clear. This is no case where there are decisions on all fours on many of these points. I have studied all of the decisions that have been cited in the briefs. I have read every one of them. And I will be very glad to have your written arguments or briefs, whatever you want to call them. I simply tell you that I am familiar with these decisions and I have studied them. So you don't [13] need to feel you will have to do a lot of quoting from the cases because I have an armful of these books right in front of me and I can refer to them.

I would like to get any written arguments that you want to file, very promptly, before I get too much enmeshed in the criminal calendar which I have to undertake. I presume the plaintiff has the opening and closing on this.

Mr. Herndon: If your Honor please, I believe that, so far as plaintiff is concerned, we would be content to submit the matter on the briefs which have heretofore

been filed. Of course, if your Honor had any particular matter that you wished further argument or briefs on, we would be most happy to comply but, as far as we are concerned, I believe that we would be satisfied to submit the cause to your Honor upon the record and upon the briefs heretofore filed.

Mr. McGinley: If your Honor please, my thoughts are in agreement with counsel as to it and I feel that your Honor has thoroughly the case in mind; and, if there is no contrary indication from the court as to any particular point raised by the matters which your Honor has discussed, on which you feel that we, as attorneys, should give further enlightenment, the defendant and counter-claimant is perfectly willing and agreeable to submitting the record as is for the decision of your Honor.

The Court: I must say that this has been a very well [14] prepared and very well presented case. I don't know how any group of lawyers could have done any better. No one tried to get technical. They were all willing to let the evidence go in and let it speak for itself, which I think in a case like this is about all we can do.

These insurance cases aren't very easy for any judge. Of course, the higher courts are up against this. If they go out of their way to decide all points that are available, they are charged with spreading a lot of dicta on the records. If they don't, they are charged with dodging the issues. So far as the nisi prius courts are concerned, I think that it is the obligation of the nisi prius courts to answer all of the contentions, whether the court agrees with them or doesn't agree, and show why he agrees with them or why he doesn't agree with them, and let the upper courts have the benefit of his views. Anyone can say, "Judgment for the plaintiff" or "Judgment

for the defendant," and 50 per cent of the time, under the law of averages, he is going to be right. But that is not fair to the attorneys and is not fair to the higher courts. Maybe I talk too much but, when a case goes up, they all know why I decided it and the attorneys below know how I decided it.

This is not an easy case. It has not been easy for either side to present it and it is not an easy case to decide. I am perfectly frank to say I know how I am going to decide this [15] case now. I can't guarantee I am right and, except for the fact that I think that you gentlemen are entitled to a pretty careful decision on your points, I could tell you right now how I am going to decide this case.

I am not at all sure but what I might just as well adjourn for a few minutes or for a little while and informally discuss these points. I think I understand what you have done and I don't know any reason for stalling it off except for the fact that it takes some time. Let me take a recess for five minutes and think about it.

(Short recess.)

The Court: As I say, gentlemen, I hadn't intended to give a decision in this case this morning because I thought that you gentlemen wanted to file further briefs and I was going to organize what I had to say and make a more or less formal job of it, though, under the circumstances, I think you are all familiar with these decisions on these matters. But I think possibly I should indicate the views that I have on the law involved. As there is a good deal of law involved behind the motions which I have acted upon, I shall give you my thoughts behind that first.

The first paragraph of the policy in suit, Plaintiff's Exhibit 3, reads as follows:

"New England Mutual Life Insurance Company of Boston agrees to pay at its home office in [16] Boston, Massachusetts, on receipt of due proof of the death of the insured, Abe Lutz, the face amount, thirteen thousand dollars, to the beneficiary, Harry Lutz, son of the insured, or if deceased, the executors, administrators or assigns of said son, the sole owner of this policy. The beneficiary is appointed without right of revocation, by the insured."

In Part I of the application, the two questions and answers thereto under No. 19 read as follows:

"Is the right to change the beneficiary reserved to the proposed insured? No

"If not, to whom are ownership and control reserved? Harry Lutz."

Part I of the application is signed by Abe Lutz, proposed insured, and Harry Lutz, applicant for insurance.

The plaintiff relies, and properly so, upon the case of *Missouri State Life Ins. Co. v. Young*, 9th Cir., Feb. 21, 1930, 38 Fed. (2d) 399.

The decision was rendered in reversing the judgment of the District Court for the District of Arizona in an action upon an accident insurance policy for \$30,000 issued to George U. Young in favor of his wife, the appellee. I won't discuss the facts although I have them all outlined here, as you are familiar with them. One of the principal questions in the case was the admissibility of declarations of the in- [17] sured made before and after the issuance of the policy concerning his state of health both before and after the date of the policy. The

issue of fraud was based upon statements made by the insured in the application for the policy in question. The insured, in his written application, stated that he had never had diabetes and answered in the negative the following question: "Have you within the past five years had medical or surgical advice or treatment or any departures from good health? If so, state when and what, and duration." With reference to these answers of the insured in his application it was alleged in the answer that the insured, during the five years prior to the date of the application, had had medical advice or treatment and had had departures from good health; and had diabetes; and that the representations made in the application were known by the insured to be false and made with the intention of deceiving the defendant; that such representations were material.

The insured retained the power to change the beneficiary.

A whole page of the opinion, page 400, is devoted to quoting the trial court's instructions on the issue of fraud.

Considerable evidence was adduced as to the ill health of the deceased during the year 1924. Several medical witnesses, in answer to a hypothetical question based upon the evidence adduced before the court, testified that in their judgment the insured suffered from diabetes during the year [18] 1924 and at the time of his application for insurance was suffering from diabetes and that he died as a result of that disease. The jury found to the contrary.

In addition to this evidence, defendant attempted to prove oral and written statements of the deceased indicating his ill health and that he consulted physicians as to his health during the year 1924 and previous thereto

within five years of the issuance of the policy. This evidence was objected to and rejected.

In writing the majority opinion, Judge Wilbur said:

"While the decisions of the state courts are at variance with reference to the admissibility of declarations or admissions of the insured as against the beneficiary seeking to recover for the death of the insured, and the rule has been varied in some states according to whether or not the policy permits the insured to change the beneficiary thereof at will (*McEwen v. N. Y. Life Ins. Co.*, 23 Cal. App. 694, 698, 139 P. 242; *Waring v. Wilcox*, 8 Cal. App. 317, 96 P. 910; *Hopkins v. Northwestern Life Assur. Co.* (CCA 3), 99 F. 199; *Union Mutual Assur. v. Montgomery*, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519; *Mobile Life Ins. Co. v. Morris*, 3 Lea (71 Tenn.) 101, 31 Am. Rep. 631; *Equitable Life Assur. Soc. of U. S. v. Campbell*, 85 Ind. App. 450, 150 N. E. 31, [19] 151 N. E. 682; *Nophsker v. Supreme Council of Royal Arcanum*, 215 Pa. 631, 64 A. 788, 7 Ann. Cas. 646; *Supreme Lodge of Knights of Honor v. Wollschlager*, 22 Colo. 213, 44 P. 598), it seems clear on principle that where the knowledge and intent of the insured in making the representations contained in his application for insurance is a material element in the case as it is here, his statements concerning his condition are admissible for the purpose of determining whether or not false representations made were known by him to be false. The authorities are almost but not quite unanimous in holding that where independent evidence is adduced tending to show that the representations by the insured in his application for insurance were false, the dec-

larations of the insured inconsistent with the facts stated in his application made about the same time are admissible for the purpose of showing his knowledge and intent in making the false representation. *Johnson v. Fraternal Reserve Ass'n.* (1908), 136 Wis. 528, (86 ALR 148n; no W.), 117 N. W. 1019; *Cummings v. Connecticut Life Ins. Co.*, 101 Vt. 73, 142 A. 82 (86 ALR 148 & 151n; W. 18, 266a, 1072, 1081); *McGowan v. Sup. Ct. of Ind. Order of Foresters*, 104 Wis. 173, 80 N. W. 603 (86 ALR 150 & 152n; [20] W. 266a, 1081, 2384); 37 Cor. Jur. 626. There may be some cases holding that even where the beneficiary can be changed at will, and even where there is independent evidence tending to show that the representations made were false, the declarations of deceased were not admissible even to show his intent or knowledge. *Supreme Lodge of Knights of Honor v. Wollschlager*, *supra*, as to declarations as to age. We do not see how these cases can be sustained on principle."

And he goes on and discusses that matter and he discusses further the questions of evidence.

"We think the question sufficiently indicates the favorable answer expected within the rule applicable to trials where the witness testified in person before the court."

"The trial court also sustained objections to certain letters written in 1924 by the insured indicating that during that year the insured was very ill, that he consulted a physician, and that he was thoroughly aware of his rather desperate physical situation."

And he gives certain samples of these letters.

“These rulings rejecting evidence of the statements of the decedent were erroneous, and [21] the case must be reversed because of these errors.”

He then discusses the case of *Logia Suprema, etc., v. Aguirre*, (1913), 14 Ariz. 390, 129 Pac. 503, which I shall not discuss. This case was also discussed by Judges Rudkin and Dietrich.

In *Johnson v. Fraternal Reserve Ass'n*, *supra*, the judgment, after special findings by the jury, was for plaintiff, and the association appealed, and it was affirmed.

To establish the defense of false representations in the deceased insured's application, some members of appellant were called as witnesses and were held incompetent to testify under a Wisconsin statute, because of their interest in the result. After discussing the statute in question, the court said, page 1020 of 117 N. W.:

“The evidence of the witnesses above referred to, which was rejected, related to mere declarations of the deceased made at times so distant from that of the application as to be inadmissible as part of the *res gestae* and counsel for appellant made no claim to the contrary. It was not admissible as evidence of the main facts, or any of them, viz., that the assured made some false misrepresentation as to her insurability, in that she was or had been afflicted with some one or more of the infirmities in respect to which she was interrogated. Laying aside as mere hearsay such evidence, there was none [22] introduced or offered tending to establish that such main facts or any of them existed. That being so, the

rulings rejecting evidence were harmless, and the similar evidence received did not establish or tend to establish the defense."

He refers also to the celebrated case of *McEwen versus New York Life Insurance Co.*, January 9, 1914, 23 Cal. App. 694, discussed in 86 ALR 150 and 162 NW. I shall not go into a discussion of that case because you are, likewise, familiar with that.

Section 1853 of the Code of Civil Procedure provides as follows:

"Sec. 1853. Declaration of decedent evidence against his successor in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

In that connection, we shall again refer to that *McEwen v. New York Life* case.

Yore v. Booth, Receiver, December 2, 1895, 110 Cal. 238, 86 ALR 153, was an action by the widow and children of Yore to recover on his life insurance policy issued May 10, 1886, payable to his "legal heirs." From a judgment in favor of plaintiffs, the defendant appealed, and that case was affirmed. [23]

That had involved many of the principles with which we are familiar but was largely a question of the age, but the discussion in the case is very interesting.

Before discussing the case of *Jenkin v. Pacific Mutual Life Insurance Co.*, 131 Cal. 121, which is discussed in 86 ALR at 159, I will quote Wigmore's comment on the case found in footnote 5, on page 87, of Volume VI, un-

der Sec. 1726. Wigmore is discussing Exceptions to the Hearsay Rule—Statements of Mental Condition. And the statement in the text concluding with the footnote reference is as follows:

“In a number of precedents sundry declarations of intention (to make a journey, to pay money, or the like) have been excluded, usually without any other apparent reason than the supposed application of the ‘*res gestae*’ doctrine.”

The portion of the footnote referred to reads as follows:

“Occasionally such statements are excluded merely because some other principle is alone invoked and the present one is ignored,” citing the *Jenkins v. Insurance Company*, 131 Cal. 121; “that is, for example, the narrow ground that they were not admissions usable against the beneficiary of an insurance policy; see this rule ante, Sec. 1081.”

The *Jenkins* case was an action brought by the assignee of the beneficiary of an accident policy issued to one Crosbie. [24] A judgment was for defendant, and plaintiff appealed, and the decision was reversed. That case you are familiar with and I don’t intend to go into it any further.

The same is also true in the case of *Mah See v. North American Accident Insurance Co.*, 190 Cal. 421, and *Paez v. Mutual Indemnity, etc. Insurance Co.*, 116 Cal. App. 654.

Wigmore on Evidence, Third Edition, Section 266, pages 87-91, contains a very good discussion of this entire matter. I shan’t take the time to read it, as you have cited it in your briefs and you are familiar with it.

I have examined the cases in all of the different States but I am not going to bother to discuss them here.

Section 266a, of the same citation, says:

"Nevertheless, the hearsay exception, being subject to certain limitations, and the rule for a party's admissions, will often not suffice for the purpose in hand, and the present, or circumstantial, use of such utterances may become the only available one. For example, in actions on life insurance policies, where the deceased's misrepresentations as to his health are in issue, his statements as to a prior illness would be inadmissible under the hearsay exception to prove that illness, and might also not be receivable as a party's admissions, under Section 1081, and [25] yet, if the fact of the illness were otherwise evidenced, the deceased's statement might be receivable as circumstantial evidence of his knowledge of it."

And he cites the Federal and State decisions on that rule.

Then, in Section 1076, "Admissions of other parties to the litigation; nominal and real parties; representative parties, and so on, he says, under Section 1081:

"The principle examined in Section 1080 may be phrased in this way: When by the hypothesis of the party himself his title as now claimed is identical with that of another person, as a prior holder, the statements of that other person, made during the time of his supposed title, are receivable against the party as admissions.

"This question of identify of title depends obviously upon the substantive law of property. In this respect it is without the scope of the law of evi-

dence, and does not call for consideration here. But a few of the commoner instances may be briefly examined for illustration's sake."

And then he goes on and discusses this particular phase of the question in a very able manner and it is interesting here to us only by analogy. The cases are exhaustively analyzed, [26] and a tenable distinction lucidly expounded, in an article by Professor Albert M. Kales, 6 *Columbia Law Review* 509, and the more recent article in *St. John's Law Review*, 1934, Vol. VIII, 258, upon admissibility of declarations of the insured in life insurance litigation.

In Vol. VI of *Wigmore on Evidence*, Third Edition, Section 1718, he says, "It is for statements of physical pain or suffering that the exception has been longest recognized and the principle most fully and clearly reasoned out. The general principle is illustrated in the following passages:

"1845, *Shepley. J.*, in *Kennard v. Burton*, 25 Me. 46: 'If other persons could not be permitted to testify to them (complaints of suffering) when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them by reason of the agitation and suffering occasioned by it.' "

Then, from *Bigelow, J.*, 1851, in *Bacon v. Charlton*, 7 *Cush.* 586:

"Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration that such

expressions are the natural and necessary language of emotion, of the existence of which, from the very [27] nature of the case, there can be no other evidence. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady."

That is a careful discussion of the question.

The two Law Review articles, referred to by Wigmore, are very interesting, as well as 86 ALR 146, in 1933, admissibility as against the beneficiary of life or accident insurance of statements or declarations by the insured outside of his application.

I refer you particularly here to *Mutual Life Insurance Co. of New York v. Selby*, Ninth Circuit, from D. of Wash., February 3, 1896, 72 Fed. 980, 86 ALR 147; to *Connecticut Mutual Life Insurance Company v. Hillmon*, January 2, 1903, 188 U. S. 208.

I refer you also to *Langdeau v. John Hancock Mutual Life Insurance Co.*, February 26, 1907, 194 Mass. 56, 80 N. E. 452, and the careful discussion of the subject and the citations there. Also *Spaulding v. Mutual Life Insurance Co.*, January 7, 1920, 94 Vt. 42, 109 Atl. 22, ALR 148, where there was a [28] considerable discussion of the situation and where the court says:

"The rule is well established that where a person procures insurance upon his life for the benefit of

another, the policy and the money to become due thereunder belong to the beneficiary named therein, and the insured has no power to change the interest of the beneficiary, unless a power of revocation or modification is reserved by the terms of the policy," citing cases.

"It is doubtless true that by weight of authority the insured's admissions or declarations, not so made as to be part of the *res gestae*, are inadmissible against the beneficiary having a vested interest in the policy, at least as proof of the facts stated."

I underlined that last statement.

"14 R. C. L. 1438 and cases there digested. The rule is apparently based upon the ground that the contract is between the insurer and the beneficiary, and the insured is not a party to the suit."

It seems that, even in such case, the evidence should be held admissible to show the insured's knowledge of his condition, and that it was fraudulently represented in the application. Professor Wigmore says that in actions on life insurance policies, where the deceased's misrepresentations as to [29] his health are in issue, his statements as to a prior illness would be inadmissible under the hearsay exception to prove that illness, and might not also be receivable as a party's admissions; and yet, if the fact of the illness were otherwise evidenced, the deceased's statements might be receivable as circumstantial evidence of his knowledge of it," citing cases.

I refer you also to *Hews v. Equitable Life Assurance Society*, Third Circuit, from the Western District of Pennsylvania, 143 Fed. 850, and *Self v. New York Life*

Insurance Co., an Eighth Circuit Court case, which has been cited, 56 F. (2d) 364.

The Self case has been cited on the admissibility point in Prudential Insurance Co. of America v. Loewenstein, 76 F. (2d) 479, and in Aetna Life Insurance C. v. McAdoo, Eighth Circuit, 106 F. (2d) 618, which is the case relied upon so heavily by the defendant on the question of a limited waiver, wherein the court said:

“The next matter of evidence is the exclusion of various statements made to appellee by the insured as to his state of health at various times prior to the issuance of the original policy and thereafter. This evidence is not admissible under the decisions of Arkansas. It would be admissible under the rule announced by this court, in an appeal [30] from the Eastern District of Arkansas, in Self v. New York Life Insurance Co., 8 Cir., 56 F. 2d 364, 366, since the policies sued on gave the insured the right to change beneficiary. As a practical matter, we need not resolve this conflict in decision. This is so because, for other reasons stated in this opinion, the case must be remanded and, on retrial, will be subject to Rule 43(a) of the new Rules of Civil Procedure for the District Courts, 28 U. S. C. A., following Section 723c. Under that Rule, such evidence will be admissible.”

I have already cited the Prudential Insurance case and I don't need to discuss that further.

Despite the confusion in the cases, the conclusion is as I have indicated in my rulings on these motions to strike. I think that that covers the basis for my decisions on these motions to strike and, after all, that is the crux of the matter.

I have listened to the matter very carefully. I think that the insured knew his physical condition. I think the evidence showed that he did and he did to my satisfaction. I think the evidence showed that those misrepresentations were material; that, if they had been familiar with the facts as they actually existed, the insurance policy would never have been written. I don't think that the defense that the defend- [31] ant was illiterate is sound for the reasons indicated in the plaintiff's brief, which are so fundamental that I need not go into a discussion of them. Here was a very shrewd man. He had accumulated a fortune and had a large income. I had quite a number of clients in my day that would never read a document at all but they would make me read it to them, some of them, because they didn't understand English very well, and some felt they could get it better through their ears. This man evidently was very careful about having documents read to him by his lawyer, his accountant, his son or a son-in-law, all of whom were very intelligent men. And I think that he knew what he was signing and I think he knew what the policy provided.

I feel that, taking the evidence all together as it gradually developed from the trial of it, there was a clear intention to waive the privilege as I have indicated. When that privilege is waived, the evidence, to me, is conclusive.

The judgment will be for the plaintiff as prayed and against the defendant on the affirmative defenses and on the counter-claim.

I think that you gentlemen will have to get together on the form of the findings and the conclusions and the form of the decree.

As I understand it, the defendant is entitled to a return of the premiums paid, which were previously tendered. I [32] haven't gone into the question about the interest on that tender after it was declined. My offhand understanding of the law is that, when a tender is once made properly, that that stops the running of interest when it is declined. I think that probably you gentlemen can get together on that.

I don't think I need to go on and discuss this matter any further. You gentlemen are so thoroughly familiar with the facts and so thoroughly familiar with these decisions that I don't think it is necessary. I don't say that there isn't any question about it and that I am right. I just think I am right but the Circuit Court of Appeals may think I am wrong. If I have decided it wrongly, it isn't because I haven't paid very careful attention to it.

Mr. McGinley: May I say this, your Honor? In every controversy there must be a victor and a loser. I want to congratulate the other side and I also want to express my appreciation of the study and the courtesy that have been extended to us during the trial of this case.

The Court: It was very well presented, and it was very carefully done. I think the Circuit Court of Appeals is getting the whole thing if it goes to appeal and that the interests of both sides have been protected.

Mr. Herndon: If your Honor please, I want to reciprocate counsel's statement. It has been a pleasure to try the case against courteous and careful counsel and

we all appreciate [33] the care and thought with which your Honor has tried it.

The Court: If you gentlemen will get together on the form of these documents, I am pretty busily engaged with the criminal calendar, after having had the influenza, and the more you can relieve me, the better it is going to be. The more you can agree on these papers, the better, and bring them in. Can you get them done in three days, do you think?

Mr. Herndon: Yes; I think so, your Honor. I am quite sure, if we can get a draft of the findings to counsel within the next two or three days, we can adjust any differences there may be.

The Court: Yes. Of course, under our system here, you can't change the court's decisions or the findings and you are not prejudicing your position by approving it as to form, in line with the court's views. You protected your position during the trial, and these findings are to reflect my views of the facts and the law. They don't change your position on the case.

Mr. McGinley: Might I ask one question? In connection with the preparation of the findings, particularly as to the defenses of waiver and estoppel, is there sufficient on those specific defenses, as indicated by your Honor, to enable counsel to make appropriate findings on those defenses?

The Court: I think so. You can just go through it and say it is true as to this and not as to that and that will [34] save a lot of trouble, just like they do in the State courts.

[Endorsed]: Filed Nov. 9, 1945. [35]

[Endorsed]: No. 11180. United States Circuit Court of Appeals for the Ninth Circuit. Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, Deceased, Appellant, vs. New England Mutual Life Insurance Company of Boston, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 13, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11180

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ,
as Executor and Executrix of the Last Will and Testa-
ment of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation,

Appellee.

CONCISE STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF PARTS OF RECORD
ON APPEAL UNDER RULE 19(6) OF THIS
COURT

Notice Is Hereby Given that at the hearing of this appeal, appellants will rely upon, and hereby formally adopt, the concise statement of points on appeal under Rule 19(6), filed in the District Court of the United States, Southern District of California, Central Division, on the 7th day of September, 1945, and appellants hereby designate the following identified portions of the record which they think necessary for the consideration of the appeal, said portions being parts of the records, proceedings and evidence contained in the original certified record transmitted by the Clerk of the United States District Court, for the Southern District, Central Division, pur-

suant to defendants'-appellants' designation of portions of the record on appeal, filed with said Court on the 7th day of September, 1945:

* * * * *

Dated: October 30, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Appellants Harry Lutz and
Harry Lutz and Rose Lutz as Executor
and Executrix of the Last Will and
Testament of Abe Lutz, Deceased

Address: 1224 Bank of America Bldg.

Received copy of the within Concise Statement of Points on Appeal and Designation of Parts of Record on Appeal Under Rule 19(6) of This Court, this 30th day of October, 1945. Meserve, Mumper & Hughes, by Roy L. Herndon, Attorneys for Appellee.

[Endorsed]: Filed Nov. 13, 1945. Paul P. O'Brien,
Clerk.

No. 11180

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RY LUTZ and HARRY LUTZ and ROSE LUTZ,
executor and executrix of the last will and testa-
nt of Abe Lutz, Deceased,

Appellants,

vs.

7 ENGLAND MUTUAL LIFE INSURANCE
OMPANY OF BOSTON, a corporation,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

BOOK OF EXHIBITS

(Pages 383 to 434, Inclusive)

Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JAN 30 1936

PAUL P. O'BRIEN

No. 11180

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ,
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[PLAINTIFF'S EXHIBIT NO. 1]

In the District Court of the United States
Southern District of California
Central Division

Civil No. 3930 R. J.

New England Mutual Life Insurance Company
of Boston, a corporation,

Plaintiff,

vs.

Harry Lutz, et al.,

Defendants.

STATEMENT RE PRE-TRIAL CONFERENCE

On March 10, 1945, counsel for the parties to the above entitled action conferred, and the following is a statement of the results of said conference:

(a) For the purposes of the trial of the above entitled action, the following facts are hereby stipulated to be true:

(1) That on November 14, 1942, at Los Angeles, California, Abe Lutz, as "proposed insured", and defendant Harry Lutz, as "applicant for insurance", signed and delivered to Stanley S. Leeds, for delivery to plaintiff, Part I of the application for the issuance of a policy of life insurance upon the life of said Abe Lutz in the face amount of \$13,000.00.

(2) That on November 16, 1942, said Abe Lutz submitted himself to a medical examination in connection with said application; that said medical examination was made by John M. Waste, M. D., at the office of said John M. Waste, Los Angeles, Cali-

(Plaintiff's Exhibit No. 1)

fornia; that at said time and place, said Abe Lutz signed Part II of said application for said policy of life insurance.

(3) That on December 1, 1942, plaintiff issued it policy of life insurance numbered 1 172 844 in the face amount of \$13,000.00 upon the life of said Abe Lutz, as insured.

(4) That said policy number 1 172 844 was delivered and the first premium upon said policy was paid on or about December 7-9, 1942, at Los Angeles, California.

(5) That a photostatic copy of Parts I and II of said application was attached to said policy at the time the same was issued and delivered as aforesaid.

(6) That attached hereto are photostatic copies of Parts I and II of said application for said policy of life insurance.

(7) That all premiums required to be paid by the insured pursuant to the provisions of said policy were paid within the time therein provided.

(8) That Abe Lutz, said insured, died on May 28, 1944.

(9) That on June 1, 1944, defendant and counterclaimant Harry Lutz filed with plaintiff a notice of the death of said Abe Lutz, insured; that on or about September 28, 1944, said Harry Lutz filed with plaintiff a notice of claim and due proof of the death of said Abe Lutz, insured.

(10) That on October 11, 1944, defendant and counterclaimant Harry Lutz received those certain

Plaintiff's Exhibit No. 1)

letters, copies of which are marked "Exhibit A" and attached to plaintiff's amended complaint on file herein, together with the check therein particularly described; that thereafter, by letter dated October 16, 1944, and signed by said Harry Lutz, said tender was rejected and said check was returned to plaintiff.

(b) Without intending hereby to limit or foreclose other possible issues, counsel have agreed that the principal issues to be determined upon the trial of this cause, stated in general terms, are as follows:

(1) Whether any matters of fact material to the risk insured against by the terms of said policy were concealed or misrepresented in the application for said policy;

(2) Whether plaintiff is estopped to rescind said policy;

(3) Whether plaintiff has waived any right which it might otherwise have had to rescind said policy;

(4) The validity of plaintiff's contention that said policy never became effective in that the insured was not in good health at the time the application for said policy was approved at plaintiff's home office and at the time the first premium was paid within the meaning of the provision of said policy "that the insurance applied for shall not take effect unless and until this application is approved by the company at

(Plaintiff's Exhibit No. 1)

its home office and the first premium is paid while the proposed insured is in good health; * * *."

(5) Whether any grounds of rescission or contest asserted by plaintiff herein are barred by the incontestable clause of said policy;

(c) That plaintiff expects to offer in evidence the following documents:

(1) This statement re pre-trial conference;

(2) The application for said policy of insurance;

(3) The policy;

(4) Report of medical examiner and agent's certificate submitted to plaintiff with said application;

(5) Records of Sansum Clinic, Santa Barbara, including medical history given by insured upon admission to said clinic on or about June 23, 1943;

(6) Hospital records of Cedars of Lebanon Hospital, including medical history given by insured after admission to said hospital on or about May 14, 1944;

(7) Death certificate of insured.

(d) That defendants and counterclaimant expect to offer in evidence the following documents:

(1) The policy;

(2) Report of Dr. John M. Waste, Medical Examiner for insurance company;

Plaintiff's Exhibit No. 1)

(3) Letter dated November 16, 1942, from Harold P. Morgan, who signs as Assistant General Agent of the insurance company to Mr. Doane Arnold, Manager Underwriting Department of plaintiff insurance company, at Boston, Massachusetts;

(4) Letter dated November 17, 1942, from Harold P. Morgan, who signs as Assistant General Agent of the insurance company to Mr. Doane Arnold, Manager Underwriting Department of plaintiff insurance company, at Boston, Massachusetts;

(5) Telegram dated December 1, 1942, from Underwriting Department of plaintiff New England Mutual Life Insurance Company to New England Mutual Life Insurance Company at 609 South Grand Avenue, Los Angeles, California;

(6) Letter dated December 1, 1942, from Doane Arnold, Manager Underwriting Department to Messrs. Hays & Bradstreet, Los Angeles, California;

(7) Letter dated December 8, 1942, from Hays & Bradstreet by Harold P. Morgan to Mr. Doane Arnold, Manager Underwriting Department, Boston, Massachusetts;

(8) Letter dated December 14, 1942 from plaintiff insurance company (H. M. Frost, Medical Director) to Hays & Bradstreet re subject "Abe Lutz—1,174,369 for additional.";

(9) Letter dated December 24, 1942, from Harold P. Morgan to Dr. Harold M. Frost, Chief Medical

(Plaintiff's Exhibit No. 1)

Director of plaintiff insurance company, Boston, Massachusetts;

(10) Telegram dated December 29, 1942, from the plaintiff insurance company to "New England Mutual Life Insurance Company, 609 South Grand Avenue, Los Angeles, California";

(11) Letter dated January 14, 1943, from plaintiff insurance company (F. R. Brown, Associate Medical Director), to Hays & Bradstreet, Los Angeles, California, re "Abe Lutz—1,174,369";

(12) "Attending Physician's Statement"—questionnaire—the form used by plaintiff insurance company;

(13) Questionnaire—form used by Equitable Life Assurance Company—referred to as an enclosure in the letter of December 8, 1942, from Harold P. Morgan to Mr. Doane Arnold, Manager Underwriting Department of plaintiff insurance company at Boston, Massachusetts;

(14) Medical office records of Dr. John M. Waste, relating to physical examinations of insured, Abe Lutz;

(15) Premium receipts showing payment of annual premiums to Hays & Bradstreet.

Counsel for the respective parties have furnished the court with the description of documentary proof upon

Plaintiff's Exhibit No. 1)

which they will rely at the time of trial. It may be that other and additional documents, competent and material to the issues raised will be disclosed at the time of trial and the foregoing description of documents is not intended to limit or prevent either party relying on additional documents.

Dated: March 10, 1945.

MESERVE, MUMPER & HUGHES

By Roy L. Herndon

Roy L. Herndon

615 Richfield Building

Los Angeles, California

Attorneys for Plaintiff

McLAUGHLIN & MCGINLEY

By John P. McGinley

John P. McGinley

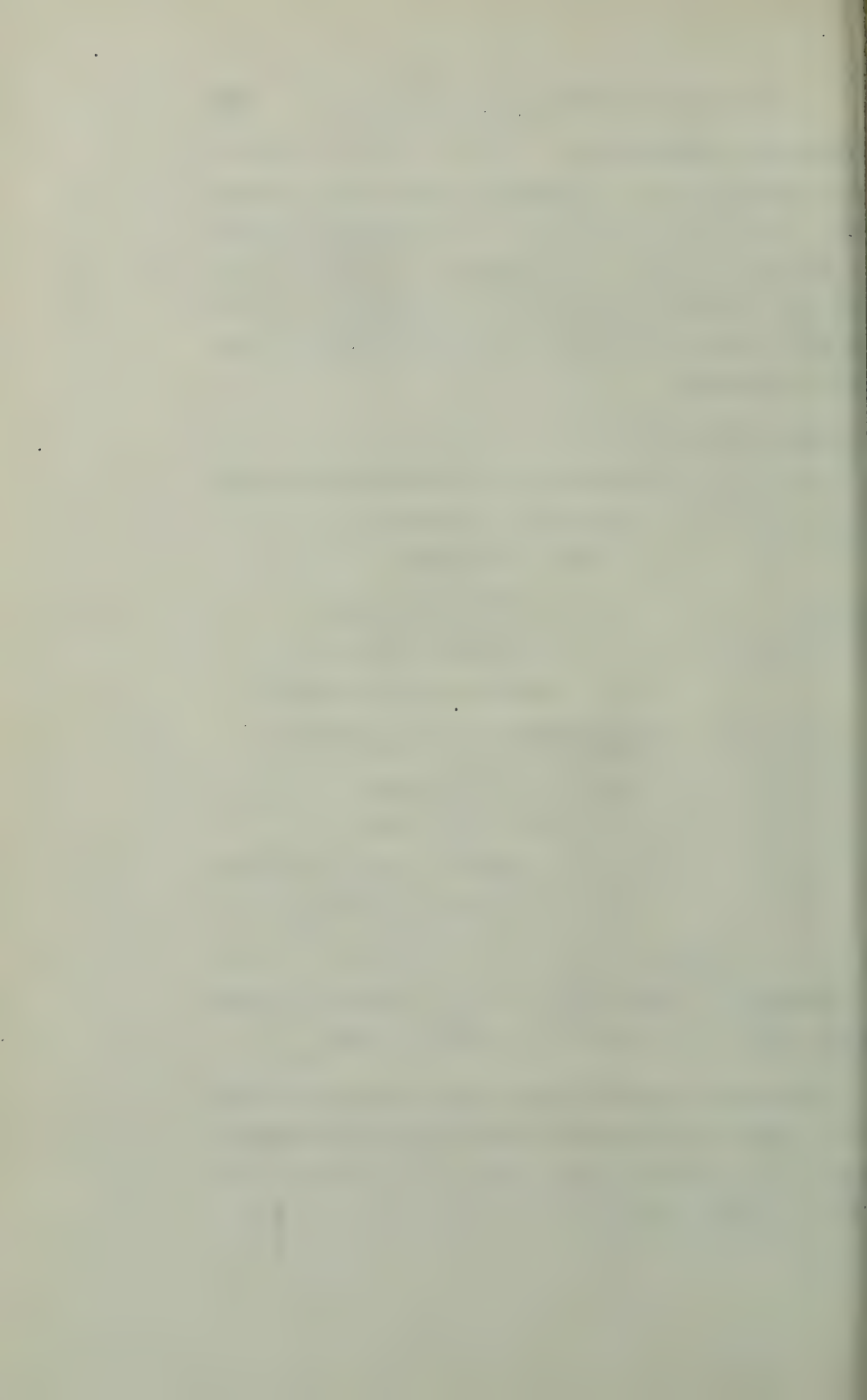
1224 Bank of America Building

Los Angeles, California

Attorneys for Defendants and Counter-Claimant

[Endorsed]: Filed Mar. 12, 1945. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy Clerk.

[Endorsed]: Case No. 3930. New England vs. Lutz. Plaintiff's Exhibit No. 1. Date 3/23/45. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.



[PLAINTIFF'S EXHIBIT NO. 2]

Agent's Certificate

To be filled out and signed by the Agent or Broker

1. How long have you known the Proposed Insured? About 8 months
2. Are you satisfied that the individual is of temperate habits and in good health? Yes
3. If Proposed Insured resides in the country: _____ miles in a _____ direction from _____
on _____ Road or Route.
4. If applicant is a Minor, give name and address of father, or of person with whom he resides. If applicant is a married woman, give full name of husband. _____
5. If Proposed Insured changed his residence or business address within a year, give the last previous address and employer. _____
6. Is an Aviation Questionnaire required by instructions above Part I? No If so, are you sending one? _____
7. Are premiums to be paid by a corporation, or from trust, guardianship or estate funds? No If so, are you submitting the required evidence of authority? _____
8. Occupation. Give comprehensive description. (Use Occupation Blank freely as circumstances make advisable.)
Completely executive - Owner of Western Iron & Metal Co.
9. If Beneficiary is not a relative, nor a business partner or associate, explain fully the insurable interest.
Son as Owner -
10. What other negotiations for Life Insurance are pending or contemplated? (State fully) Equitable just issued 1000. Standard Insurance
11. Has insurance applied for on life of Proposed Insured ever been declined, postponed or modified as to kind, amount or rate? (State fully) No
12. What is your estimate of Proposed Insured's financial worth? \$ 500,000 earned income? \$ 75,000
total income? \$ 100,000
13. Is the proposed insurance intended to replace any now carried in this or any other Company? (If so, state reasons and indicate Companies and form of insurance; if this Company, give policy numbers.)
No
14. Do you unqualifiedly recommend approval of the Application? Yes
The attached slip indicating source of business must be completed.

Los Angeles Nov. 14 1942Stanley S. LeadAgent
Broker

General Agent's Certificate

1. What is this Agent's status? Full-time _____ Part-time _____ Agent of another Company _____ Broker ☒
2. Is the Agent licensed where this Application is written: for this Company? _____ for another Company? ☒
as Broker? _____
3. Are you sending the Home Office such material facts and special information as will assist in the final consideration of this Application? Yes Additional information regarding finances, purpose of insurance, dates of issue and plans of other insurance, and other special items, are desirable and will help to avoid delay when a large amount of insurance is applied for or carried.

Nov. 17 1942Harry & Brewster General Agent

Instructions

1. Check over every part of this Application before you send it to the Company. See that the Application and the Medical Report are clear, correct and complete.
2. Be sure that all information needed for inspection purposes is given as fully and clearly as you would wish were you responsible for inspecting.
3. Unless otherwise authorized, credit for this business will be given to the person named above Part I. See that the correct name appears. If a firm, give also name of individual solicitor. The name credited in your monthly analysis of new business must coincide.

(Plaintiff's Exhibit No. 2)

Unless right to change Beneficiary is reserved, a release of the interest of any Minor Beneficiary, under an order of court by a legally appointed Guardian, may be required before any change, surrender, or loan can be effected.

If the premium is paid on date Application is signed, the Policy will usually bear that date. If a different date is desired, indicate it clearly in the Application.

If the Automatic Premium Loan Provision is selected, a Request, which includes assignment, must be filed in duplicate with the Company before a Policy can be issued. This Application is the property of the Company, to whom it must be returned after the Medical Examination is made and the Application completed. It must not be withdrawn or destroyed.

A Questionnaire on Aviation must be sent to the Home Office if the Proposed Insured intends to fly as a passenger more than five hours during the next twelve months, or if he has made more than six flights in any year with a maximum of twelve hours' duration, or if he has ever made more than twenty flights with a maximum of forty hours' duration; or if he has ever piloted a plane or seriously considered learning to do so; or if he is associated with a company manufacturing or operating aircraft; or if he is an officer of the Army, Navy, or the Marine Corps. A flight is one take-off and landing.

USE BLACK INK
WRITE LEGIBLY

DO NOT WRITE ABOVE THIS BORDER EXCEPT AS INDICATED

The First Mutual Life Insurance Company Chartered in America

Part I—Application to the New England Mutual Life Insurance Company

1172844

For Insurance on the Life of

Abe Lutz

(Print name of person to be insured in the Policy)

1 Residence Address No. 220 Street S. H. Andrews Los Angeles Cal.	14 Form of Insurance Ordinary Life with 10% Dividend	Waiver of Premiums <input type="checkbox"/>
2 Business Address No. 2500 Santa Fe Los Angeles Cal.	15 Amount \$13,000	16 Relationship Son
3 To whom sent - have you premium notices to be sent? Name Harry Lutz Address 2500 Santa Fe Los Angeles	17 To whom payable Harry Lutz	18 Is the right to change the Beneficiary reserved to the Proposed Insured? No
4 Date of Birth April 15 1878	19 If not, to whom are ownership and control reserved? Harry Lutz	20 Insurance in force on life of Proposed Insured (If space inadequate, send memorandum) Amount 40000 Double Indemnity 113,000
5 City or Town Russia	21 Apply Dividends under Option C (A. Pay in cash; B. Apply to reduce premiums; C. Use to purchase paid-up additions; D. Accumulate at interest.) If no, provide and attach First Premium Certificate	22 Non-forfeiture Provision to be applied upon failure to pay premiums "Extended Term" "Paid-up" Extended term
6 Date of Birth April 15 1878	23 Nature of Occupation self employed	24 paid Agent on _____
7 Age nearest Birth day 47	25 First Premium \$10.00	
8 Sex Male	26 Signature of Proposed Insured Abe Lutz	
9 Single, married, widowed or divorced Married	27 Signature of Agent Stanley B. Seeds	
10 Any change contemplated No	28 Signature of Applicant for Insurance Harry Lutz	
11 Any change contemplated No	29 Signature of Proposed Insured Abe Lutz	
12 Remarks Member of Western Iron + Metal	30 Signature of Agent Stanley B. Seeds	
13 Remarks self employed	31 Signature of Applicant for Insurance Harry Lutz	

Reserve for HOME OFFICE USE, for ADDITIONS and AMENDMENTS

It is Hereby Agreed that this Application, including Part II, a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued hereon; that acceptance of a Policy shall constitute ratification of any and all changes noted by the Company under "Additions and Amendments", and that the insurance applied for shall not take effect unless and until this Application is approved by the Company at its Home Office and the first premium is paid while the Proposed Insured is in good health; provided that subsequent premiums shall be due and subsequent policy years begin as shown on the first page of the Policy. If, however, the first premium is paid with this Application, and it is so stated in answer to Question 24, the insurance shall take effect as stipulated in the Conditional Receipt.

Signed in my presence this 14 day of Nov.

19 42

Stanley B. Seeds

Agent
Broker

Proposed Insured.

Applicant for Insurance.

Only one signature required if Proposed Insured and Applicant for Insurance see the same.

References

Name

Address

DO NOT WRITE BELOW THIS LINE EXCEPT AS INDICATED

(Plaintiff's Exhibit No. 2)

LOS ANGELES, CAL.

H & B

USE BLACK INK
WRITE LEGIBLYThe Medical Examiner must obtain, and insert in his own handwriting, an explicit answer to every question.
If space insufficient, enter additional details under Question 44, or send by letter and so state under Question 44.

Part II - Application to the New England Mutual Life Insurance Company

25 In what countries outside the United States
do you intend to travel or reside?26 A How many aerial flights have you made?
(A flight is one take-off and landing)

B How many flights do you expect to make in next twelve months?

C Have you piloted or do you intend to pilot aircraft?

27 What other negotiations for Life or Disability
Insurance are pending or contemplated? (State fully)28 Has insurance applied for on your life ever
been declined, postponed, or modified
to kind, amount or rate?

(State fully)

29 What illnesses, diseases or injuries have you had since childhood? Describe fully.

NAME OF DISEASE	DATE OF ATTACK	DURATION	SEVERITY	RESULTS
Myeloma	1915	2 months	mod.	dead
Heart, also, nervous system	since 1910		mod.	

30 What surgical operations
have you had?31 Have you ever retched
or spit blood?32 In the last two years, how
much has your weight

(Increased?) Decreased?

33 How long has your present
weight been maintained?34 If any change in weight,
give the reason

35 Have you ever suffered from:

(Give details under each)

A Indigestion?

B Insomnia?

C Nervous strain
or depression?

D Overwork?

E Dizziness or
fainting spells?F Palpitation
of heart?G Shortness
of breath?H Pain or pressure
in the chest?36 A Have you consulted, or been examined by, a
physician or other practitioner within five years?

B If so, give reason, name of practitioner and details under 44

37 Have you ever had or been suspected of having:

(Give details under each)

A Syphilis?

B Other genito-
urinary disease?C High or low
blood pressure?D High or low
blood pressure?E Cancer or
other tumor?

F Tuberculosis?

38 State past and present use of wines, spirits and
smell. Give score, show amount and kind used daily.39 Have you ever used opium, morphine,
cocaine, or other narcotic drugs?40 Have you been exposed to tuberculosis
in the last three years?41 Has any member
of your family:

A Been insane?

B Been syphilitic?

C Committed
suicide?

D Had tuberculosis?

E Had diabetes?

42 A Have you ever changed your residence on account of your health?

B Have you ever been examined or treated in
a hospital, sanatorium or other institution?

43 FAMILY RECORD Give the most definite information possible. If impaired health is indicated, explain fully.

PARENTS, ETC.	LIVING		DEAD			GRANDPARENTS	LIVING		AGE
	AGE	HEALTH	AGE	CAUSE OF DEATH	DATE	HOW LONG ILL	AGE	DEAD	DEAD
A Father			80	age	1930	badly	F Father's Father		81
B Mother			77	age	1924	short	G Father's Mother		78
C Brothers	68	bad					H Mother's Father		78
No. Living	1						I Mother's Mother		78
" Dead	0								
D Sisters	26	good							
No. Living	3								
" Dead	0								
(If none, so state)	60	good							
E Wife or Husband	60	good							

44 SPECIAL INFORMATION:

36 Dr. Hanger, H. H. Hanger - 1928 - August - 1928 - (Physician) Examination - result
Slight abnormality - spot - not unusual.

30 - Examination slightly enlarged, previous to - 1930 - good results.

Signed at Los Angeles in my presence

this 16 day of November 1932

John M. W. W. Medical Examiner.

I certify that I have read my answers to the foregoing questions, that they are true and complete, and that they are correctly recorded. I expressly waive to such extent as may be lawful, on behalf of myself and of any person, who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired, and I authorize any such disclosure.

Signature of the person examined.

Chartered 1835

EDITION, JANUARY, 1930

G-9-30

DO NOT WRITE BELOW THIS BORDER

When completed, give to the Agent or transmit Promptly to the General Agent.
If space insufficient, enter additional details under Question 71 or forward by letter and so state under Question 71.

<p>43 General appearance (Healthy or otherwise) <i>Healthy</i></p> <p>47 Completion <i>Healthy</i></p> <p>49 Girth of chest: <i>28 in.</i></p> <p>51 Did you examine chest with stethoscope? <i>Yes</i></p> <p>53 Height (With shoe) <i>5 ft. 11 in.</i></p> <p>55 Weight (Fully dressed) <i>180 lbs.</i></p> <p>57 Pulse: <i>A Rate 74 B Regular C Quality Good</i></p> <p>59 Reflexes: <i>A Pupils Normal B Knee Normal C Romberg Negative</i></p> <p>61 Blood pressure: <i>A Syst. 120 B Diast. 80 (each Phase) 78</i></p> <p>63 Urinalysis: (See Note) <i>A Are you satisfied that the specimen is authentic? - Yes B Specific Gravity (Must be 1.010 or higher) C Albumin 0.018</i></p> <p>65 D Sugar <i>None</i></p>	<p>45 Race <i>White</i></p> <p>47 Color of eyes <i>Blue</i></p> <p>49 Girth of abdomen <i>38 in.</i></p> <p>51 Is temperature normal? <i>Yes</i></p> <p>53 Did you personally measure? <i>Yes</i></p> <p>55 Did you personally weigh? <i>Yes</i></p> <p>57 C Quality <i>Good</i></p> <p>59 C Romberg <i>Negative</i></p> <p>61 C Albumin <i>None</i></p>	<p>67 Is there any evidence of past or present disease of:</p> <p>A Brain or Nervous System? <i>No</i></p> <p>B Heart or Blood Vessels? <i>No</i></p> <p>C Lungs or Respiratory Tract? <i>No</i></p> <p>D Stomach or any Abdominal Organ? <i>No</i></p> <p>E Kidneys or Genito-Urinary Organs? <i>No</i></p> <p>F Skin or any part of the body? <i>No</i></p> <p>G Is there a hernia? (If so, describe fully) <i>No</i></p> <p>H Is there any deformity, loss of member, impaired sight or hearing? <i>No</i></p>	<p>69 Describe any scars or other marks of identification. <i>General appearance - fair, with freckles, eyes - light, curly, hair - chestnut, thin - deep, nose - straight.</i></p> <p>71 A Was the examination made in your office? <i>No</i></p> <p>B If not, where? <i>No</i></p> <p>73 Were you and the Proposed Insured alone? <i>Yes</i></p> <p>75 Has the examination been made under satisfactory conditions? <i>Yes</i></p> <p>77 Have you any other information which might affect the Company's decision? Give details under 71 or in letter to Home Office. <i>No</i></p>
---	---	--	---

AL INFORMATION:

applicant has not been under previous treatment except insurance
company - states he cannot find anyone who can help him.

Change in wt. gradual - last summer realized he was getting
too fat so began cutting down diet & doing a little more
active work. No change in 3 months - He looks well.

*NOTE: MICROSCOPIC ANALYSIS BY OUR CHEMIST is required when the insurance applied for, or together with that in force in this Company, exceeds \$30,000; when the Proposed Insured has passed his sixtieth birthday or is twenty-five per cent or more over normal weight. The specific gravity of the specimen must be 1.015 or higher.

Chemist _____ because of _____ Reason for microscopic analysis _____
Name of Chemist _____

19

[Endorsed]: Case No. 3930. New England vs. Lutz.
Plf's Exhibit No. 2. Date 3/23/45. No. 2 in Evidence.
Clerk, U. S. District Court, Sou. Dist of Calif. P. D.
Rooser, Deputy Clerk.



...the ... of ...
 ...the ... of ...
 ...the ... of ...
 ...the ... of ...

[PLAINTIFF'S EXHIBIT NO. 4]

the furnishing of this blank for proof of death shall not be deemed a waiver of any defense under the policy or constitute an acknowledgment of any liability of the Company on the policy.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY
OF BOSTON, MASSACHUSETTS

NOTICE OF CLAIM and PROOF OF DEATH

Notice is hereby given to the New England Mutual Life Insurance Company, of Boston, That Abe Lutz of 012 So. Highland Avenue County of Los Angeles State (Legal Residence) of California, deceased, the person insured by said Company in the sum of \$13,000. dollars, by its Policy of Insurance No. 1,172,844, died at Los Angeles on the 28th day of May 1944, and was buried in Cemetery, at, and, in accordance with the terms thereof, the Statement of the Attending Physician is herewith appended.

(Signature of Claimant) Harry Lutz

NOTICE

- . The claimant's statement must be signed by the beneficiary named in the policy or the recorded assignee, if any.
- . When the beneficiary is a minor, the statement must be signed by the duly appointed Guardian, a certificate of whose appointment is required.
- . When, by the death of a named beneficiary, the policy becomes otherwise payable, an official certificate of the death of such beneficiary must be furnished, unless it has previously been filed with the Company.

(Plaintiff's Exhibit No. 4)

4. When the proceeds of a policy are payable to an executor or administrator, a certificate from the proper Court of authority to act in that capacity is required.
5. When the cause of death is unusual in any respect, the notice and proof of the death must conform to the circumstances of the case and the identity of the person must also be established. The Company reserves the right to require further information when it is deemed necessary.
6. The intervention of any third person is not necessary to obtain payment of the claim. Payment of fees or commissions to any person for services in making proof or collection of the amount due is unnecessary.

[Stamped]: Sep 23 8:19 AM 1944 Claim Dept.

CERTIFICATE OF IDENTITY

I hereby certify that I have been acquainted with Abe Lutz, the deceased, for 14 years, and how him to have been the identical person insured in the New England Mutual Life Insurance Company.

Name, J J Fisher

Address, 2017 N. Argyle St.

Note.—In case of accidental death or suicide, a certified copy of the testimony before, and verdict of the Coroner's Jury or the Medical Examiner, and all available information, including newspaper reports relating thereto, must accompany the proof of Death.

See Reverse Side for Attending Physician's Statement

Plaintiff's Exhibit No. 4)

ATTENDING PHYSICIAN'S STATEMENT

1. Name of the deceased Abe Lutz
2. Age last birthday about 65
3. Residence 1012 So. Highland Ave., L. A.
4. Occupation Unknown
5. Date of death May 28, 1944
6. Place of death His home. 1012 So. Highland Ave.
7. (a) Were you the attending physician? Yes
(b) If so, for how long? since January 16, 1937
8. State the cause of death with full details Acute coronary thrombosis
9. When was the disease first
 - (a) suspected? about a week or two before patient died.
 - (b) recognized or treated? About the same day.
 - (c) and by whom? by me
10. If death was due to violence, was it
 - (a) suicide? No
 - (b) homicide? No
 - (c) or accident? No
11. Was there a post-mortem examination or inquest? No
(If so, a certified copy of the report must be attached hereto.
See note Page 1.)
12. Did you see the deceased after death? Yes

Dated this 8th day of June 1944

M H Rosenfeld M.D.

(Plaintiff's Exhibit No. 4)

State of California)
) ss.
County of Los Angeles)

On this 9th day of June 1944, before me came the above-named M. H. Rosenfeld, known to me as a physician in regular standing, and made oath that the answers by him given to the foregoing questions are true and full, to the best of his knowledge and belief.

(Seal)

Wm. D. Story
Notary Public.

My Commission expires May 28th 1948

[Attach Notarial Seal]

[Endorsed]: Case No. 3930. New England vs. Lutz.
Plf's Exhibit No. 4. Date 3/23/45. No. 4 in Evidence
Clerk, U. S. District Court, Sou. Dist of Calif. P. D.
Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 5]

STEPHEN G. SEECH, M.D.

418 Westlake Professional Bldg.

2007 Wilshire Boulevard 83208

Los Angeles, California 1-15-37

Phone FIitzroy 0210 75c

Name Mr. A. Lutz

Address 220 S. St. Andrews Place

Date 1/15/37

R

Tabl. Phenobarbitol

P D Co. #699 grn ¼

No. L

S. 1 tablet evy 4 hrs.

(8-12-4-8)

[Illegible]

S G Seech M.D.

Reg. No. 7124

* * * * *

[Endorsed]: Case No. 3930. New England vs. Lutz.
Plf's Exhibit No. 5. Date 3/23/45. No. 5 Identification.
Date 3/23/45. No. 5 in Evidence. Clerk, U. S. District
Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 6]

STEPHEN G. SEECH, M.D.

418 Westlake Professional Bldg.

2007 Wilshire Boulevard

Los Angeles, California

Phone: FIzroy 0210

Name Mr. A. Lutz

Address 220 St Andrews Pl

Date 10/11/37

84017

10-11-37—75c

B

Sat. Sol. of K J

Sat.Sol.K.I.

Z j

S. 10 drops bid PC in $\frac{1}{2}$ glass of milk

(b.i.d)

[Illegible]

S G Seech M.D.

Reg. No. 7124

* * * * *

[Endorsed]: Case No. 3930. New England vs. Lutz.
 Plf's Exhibit No. 6. Date 3/23/45. No. 6 Identification.
 Date 3/23/45. No. 6 in Evidence. Clerk, U. S. District
 Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 7]

HENRY H. LISSNER, M.D. MAURICE H. ROSENFELD, M.D.
Reg. No. 168 Cardiology and Internal Medicine Reg. No. 4768
Res.: Office: 1908 Wilshire Blvd. Res.:
156 S. Hobart Blvd. Los Angeles, Calif. 163 N. McCadden Pl.
Ochester 1878 Phone: EXposition 1369 Day or Night— WYoming 8066
Hours by Appt.

Name Mr Lutz Date 6-1-42

Address 220 So St Andrews Pl Los Angeles, Calif.

R

89543

75¢—6-1-42.

H. T. Hy Nitro Glycerine gr 1/150
No 30

Sig.—Dissolve one tablet under tongue for heart pain
[Crest] M H Rosenfeld M.D.

* * * * *

[Endorsed]: Case No. 3930. New England vs. Lutz.
Plf's Exhibit No. 7. Date 3/23/45. No. 7 Identification.
No. 7 in Evidence. Clerk, U. S. District Court, Sou.
Dist. of Calif. P. D. Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 10]

Cedars of Lebanon Hospital
Los Angeles, California.

You Are Hereby Authorized to exhibit to bearer hereof hospital charts and records with reference to Abe Lutz, deceased.

This patient was admitted on or about May 15, 1944. Reference is made to hospital chart number A 1066.

Very truly yours,

M H Rosenfeld

Maurice H. Rosenfeld, M. D.

[Endorsed]: Case No. 3930. New England vs. Lutz. Plf's Exhibit No. 10. Date 3/23/45. No. 10 Identification. Date 3/23/45. No. 10 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 11]

This will authorize you to furnish the bearer who represents The Equitable Life Assurance Society of the United States with any and all information you may have concerning the medical history, illness and treatments of Abe Lutz, deceased.

Harry Lutz

Name

1012 So Highland Ave Los Angeles Calif
Address

Son

Relationship

Dated June 7 1944

[Written]: MR

BC 746-43-1

[Endorsed]: Case No. 3930. New England vs. Lutz. Plf's Exhibit No. 11. Date 3/23/45. No. 11 Identification. Date 3/23/45. No. 11 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 20]

This will authorize you to furnish the bearer who represents New England Mutual Life Insurance Co. of Boston, Mass. with any and all information you may have concerning the medical history, illness and treatments of Abe Lutz, deceased.

Harry Lutz

Name

1012 S. Highland,

Address

Los Angeles, Calif.

Son

Relationship

Date June , 1944

BC 746-43-1

[Endorsed]: Case No. 3930. New England vs. Lutz. Plf's Exhibit No. 20. Date 3/26/45. No. 20 Identification. Date 3/26/45. No. 20 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 27]

FILED

MAR 21 1945

NEW YORK, N.Y.

Harry Lutz

Unless right to change Beneficiary is reserved, a release of the interest of any Minor Beneficiary, under an order of court by a legally appointed Guardian, may be required before any change, surrender, or loan can be effected.

If the premium is paid on date Application is signed, the Policy will usually bear that date. If a different date is desired, indicate it clearly in the Application.

If the Automatic Premium Loan Provision is selected, a Request, which includes assignment, must be filed in duplicate with the Company before a loan can be issued.

This Application is the property of the Company, to whom it must be returned after the Medical Examination is made and the Application completed. It must not be withdrawn or destroyed.

A Questionnaire on Aviation must be sent to the Home Office if the Proposed Insured intends to fly as a passenger more than five hours during the next twelve months, or if he has made more than six flights in any year with a maximum of twelve hours' duration, or if he has ever made more than twenty flights with a maximum of forty hours' duration, or if he has ever piloted a plane or seriously considered learning to do so, or if he is associated with a company manufacturing or operating aircraft, or if he is an officer of the Army, Navy, or the Marine Corps. A flight is one take-off and landing.

USE BLACK INK
WRITE LEGIBLY

DO NOT WRITE ABOVE THIS BORDER EXCEPT AS INDICATED

The First Mutual Life Insurance Company Chartered in America

Part I—Application to the New England Mutual Life Insurance C
For Insurance on the Life of

1172844

Abe Lutz

1 Residence Address 220 D. St. Andrews Los Angeles, Cal.	14 Insured's Insurance Ordinary Life with over ¹⁰⁰⁰ 1000 ¹⁰⁰⁰	15 Amount 13,000	16 Date of Birth April 15 1878
2 Business Address 2500 Santa Fe Los Angeles, Cal.	17 To whom payable Harry Lutz	18 Relationship Son	19 Is there right to change the Beneficiary reserved to the Proposed Insured? No
3 To whom and where are premium notices to be sent? Harry Lutz 2500 Santa Fe Los Angeles, Cal.	20 Insurance in force on life of Proposed Insured N.Y. Life	21 Apply dividends under Option C Pay in cash. B Apply to reduce premiums. C Use to purchase paid-up additions. D Accumulate and interest.	22 Nonforfeiture Provision to be applied upon failure to pay premiums Extended term
4 Place of Birth Russia	5 Nationality U.S.A.	6 Sex Male	7 Age nearest birthday 67
8 Date of Birth April 15 1878	9 Single, married, widowed or divorced Married	10 Occupation Self employed	11 Any change contemplated No
12 Employer Self employed	13 Nature of business Auto + Construction Equitable	14 day of Nov.	15 year 1942

Reserve for HOME OFFICE USE, for ADDITIONS and AMENDMENTS

40000
113,000

It is Herely Agreed that this Application, including Part I, a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued hereon, that acceptance of a Policy shall constitute acceptance of all conditions and changes noted by the Company under "Additions and Amendments", and that the Insurance applied for shall not take effect unless and until the same is approved by the Company at its Home Office and the first premium is paid while the Proposed Insured is in good health, provided that subsequent premiums shall be due and subsequent policy years begin as shown on the first page of the Policy. If, however, the first premium is paid with this Application, and it is so stated in answer to Question 24, the insurance shall take effect as stipulated in the Conditional Receipt.

Signed in my presence this 14 day of Nov.

Stanley E. Seeds

Agent
Broker

Harry Lutz

Proposed Insured.

Applicant for Insurance.

References
Name

DO NOT WRITE BELOW THIS LINE EXCEPT AS INDICATED

Address

Chartered 1835

USE BLACK INK
WRITE LEGIBLY

The Medical Examiner must obtain, and insert in his own handwriting, an explicit answer to every question. If space insufficient, enter additional details under Question 44, or send by letter and so state under Question 44.

LOS ANGELES, CAL.
H & B

27 What other negotiations for Life or Disability Insurance are pending or contemplated? (State fully)

20 Has insurance applied for on your life ever? *Yes*

to kind, amount or rate?
(State fully)

30 What vertical operations have you used? Sum, Diff, \times , \div , \log

A Syphilis? ☒ **Other venere-**

urinary disorder? Yes

high or low blood pressure? *no* Cancer or other tumor? *no*

38 State past and present use of wines, spirits and
malt liquors: show amount and kind used daily.

39 Have you ever used opium, morphine, cocaine, or other narcotic drugs?

40 Have you been exposed to tuberculosis in the last three years?

41 Has any member ☐ A Book loaner?

of your family: _____

C. Cocci in urine? no D. Find tubercle bacilli? no

42 A Have you ever changed your residence on account of
☐ Have you ever been employed or treated in

5 Have you ever been examined or treated in a hospital, sanatorium or other institution?

43 FAMILY RECORD Give the most definite information possible. If impaired health is indicated, explain fully.

44 SPECIAL INFORMATION: *1st Lt. Fred B. ...*

1172-0 by [unclear] x [unclear]

rust. ✓

Feb. 16. 1900.

as a subsidiary - 1930

certify that I have read my answers to the foregoing questions.

plete, and that they are correctly recorded. I expressly
awful, on behalf of myself and of any person who shall

any policy issued hereunder, all provisions of law forbid-

disclosing any knowledge or information which he the

ny such disclosure.

Page 10 of 10

I certify that I have read my answers to the foregoing questions, that they are true and complete, and that they are correctly recorded. I expressly waive to such extent as may be lawful, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired, and I authorize any such disclosure.

Signature of the person examined





(Plaintiff's Exhibit No. 27)

[illegible]



FILED

MAR 21 1945

EDMUND J. SMITH Clerk

If space insufficient, enter additional details under Question 71 or forward by letter and so state under Question 71.

49 General appearance (Healthy or otherwise)	49 Color of hair	49 Color of eyes	53 Is there any evidence of past or present disease of
49 Completion	49 Color of skin	49 Color of hair	A Nervous System
50 Climb of A Inspect	50 Expiration	51 Climb of A Inspect	C Lungs or Respiratory Tract
50 Climb of B Inspect	51 Expiration	52 Is there any evidence of past or present disease of	D Stomach or any Abdominal Organ
51 Did you examine chest with skin bare?	52 Is there any evidence of past or present disease of	53 Is there any evidence of past or present disease of	E Eyes or Middle Ear
51 Height (Full dress)	53 Did you personally examine?	54 Is there any evidence of past or present disease of	H Rheumatism or Gout
52 Weight (Fully dressed)	54 Did you personally weigh?	55 Is there any evidence of past or present disease of	I If so, in a suitable train worn?
53 Pulse: A Rate	55 Regular	56 Quantity	
53 Refuse: A Pulse	56 Known	57 Known	
54 Blood pressure: A Sps.	57 Dia.	58 Pulse	
54 Urticaria: (See Manual)	58 Are you satisfied that the specimen is authentic?	59 Specific Gravity (See Manual)	
55 Specific Gravity (See Manual)	60 Albumin	61 Sugar	
56 The following questions to be answered if Proposed insured is a woman	62 Number of children	62 Age of those living	
63 Has she ever been pregnant and labor been normal?	64 Has she ever had any miscarriage or any disease of the breasts or generative organs?	65 Has she ever been diseased of the breasts or generative organs?	
64 Was the examination made in your office?	65 If not, where?	66 Were you and the Proposed insured alone?	
67 Has the examination been made under satisfactory conditions?	68 Have you any other information which might affect the Company's decision? (See clause in under 17 in letter to Home Office)		

71 SPECIAL INFORMATION:

applicant has just been advised that you put all the necessary
details of the 2nd annual blood sugar test in the report.
Change in wt. gradual - last summer realized he was getting
too fat so began cutting his diet. In doing a better diet
active work. no change in 3 months. He looks well.

Examined at 607 - La. Hill St., Chicago, Ill. Date Nov. 11, 1902 M.D.
this 16 day of November 1902 Medical Examiner

*NOTE: MICROSCOPIC ANALYSIS BY OUR CHEMIST is required when the insurance applied for, or together with that in force in this Company, exceeds \$30,000; when the Proposed Insured has passed his sixtieth birthday or is twenty-five per cent or more over normal weight. The specific gravity of the specimen must be 1.015 or higher.

In accordance with these requirements, a specimen has been transmitted to

Chemise

_____ because of _____

Name of Character

Reason for microscopic analysis

19

General Agent.

(Plaintiff's Exhibit No. 27)

[Written]: Plaintiff's Ex. 3 for Iden RMK

[Stamped]: Medical Department Nov. 24, 1942

[Stamped]: Nov 23 2 54 PM 1942 Control Dept.

T. G. M.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

of Boston, Massachusetts

MEDICAL DEPARTMENT
REPORT OF URINARY ANALYSIS

Passed by Abe Lutz

In presence of Dr. John M. Waste

Date passed 11-16-42

Reason for analysis Age and History of Blood Sugar

Specific Gravity 1023 Color . . . straw

Urea (per cent) 2.3% Reaction . . . acid

(Omit if Sp. Gr. less than 1.015)

Diacetic Acid . none Bile Pigments none

Albumin . . . none (Quantitative (per cent)

Sugar none (Quantitative (per cent)

Sediment: (Omit if Sp. Gr. less than 1.015)

(1) Crystalline very few calcium oxalate

(2) Casts none found

(3) Other organized elements

1 pus cell per 10 Standard Fields

Remarks:

[Stamped]: Medical Director Nov 24 1942 Under-
writing Dept. Nov 27 1942 M. H. Jackson

(Plaintiff's Exhibit No. 27)

Examined at 11-18-42 for Hays and Bradstreet Agency
Date 2:00 P.M. 19.....

Signed M E Bettin MD

Chemist.

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by, Deputy Clerk.

[Written]: Plaintiff's Ex. 4 for Iden RMK

[Stamped]: Medical Department Nov 27 1942

[Stamped]: Nov 27 9 23 AM 1942 Control Dept.

[Stamped]: Dec 1 1942 M. A. L.

[Crest]

THE EQUITABLE LIFE ASSURANCE SOCIETY
of the United States

393 Seventh Avenue, New York

Thomas I. Parkinson, President

Medical Department

R. M. Daley, M. D., Medical Director

E. W. Beckwith, M. D.

W. A. Smith, M. D.

P. G. Denker, M. D.

B. C. Syverson, M. D.

O. W. King, M. D.

H. E. Ungerleider, M. D.

F. W. McSorley, M. D.

Assistant Medical Directors

Assistant Medical Directors

November 25, 1942

The Medical Director

New England Mutual Life Insurance Company

Boston, Massachusetts

(Plaintiff's Exhibit No. 27)

Re: Abe Lutz
born April 15, 1878

My dear Doctor:

This is in reply to your wire of November 19th asking us to forward you photostats of our papers, has been referred to this Department to furnish you with particulars of our file.

We regret that we are unable to comply with your request to send photostats inasmuch as it is not the Society's practice to submit copies of our papers to other companies on this type of case.

Mr. Lutz applied September 4, 1942 for \$5,000 Ordinary Life without features, in favor of the Hebrew Free Loan Society of Los Angeles, Calif., and an additional \$5,000 Ordinary Life without features on the owner form, with his son, Harry Lutz as owner and beneficiary.

He was examined the same day and at that time our examiner reported: "Height 5 ft. 8½ inches, by measurement, weight 180 pounds, by scale. Since April 1942 applicant has taken a three months' vacation and has been traveling. He has reduced about 15 pounds. He appears in good condition. He has consulted Dr. Maurice Rosenfeld and Dr. Henry Lisner and had a blood sugar test made; this was said to be good."

A specimen of urine analysed at our Home Office September 8th showed specific gravity 1.020, a few squamous cells and a moderate number of uric acid crystals.

Dr. Lisner forwarded us a certificate on September 3d stating that on August 11, 1942 the blood sugar test showed 111 mgm. per 100 c.c.

(Plaintiff's Exhibit No. 27)

On October 21, 1942 a review was completed and our examiner reported: "Between June 1942 and September 1942, the applicant took a trip with his family and drove his automobile. He gradually lost 15 pounds probably due to less eating and more exercise. He had been fat and soft and weighed 195 pounds. He has improved his health and looks good."

for: The Medical Director

New England Mutual Life Ins. Co.

re:: Abe Lutz

A blood sugar test was made October 21st and analysed at our Home Office October 23d. The results of this test are revealed in our report of November 9, 1942.

We approved at standard rates as applied for as a limit.

Our agency asked us if we would be willing to consider an additional \$20,000 Ordinary Life, but we refused inas much as we did not feel justified in increasing our liability on this risk.

Very truly yours,

Robert M. Daley, M.D.,

Medical Director R

tr;sa

[Endorsed]: Case No. 3930. New England vs. Lutz. Plf's Exhibit No. 27. Date 3/28/45. No. 27 in Evidence. Clerk. U. S. District Court, Sou. Dist of Calif. P. D. Hooser, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 29]

New England Mutual Life Insurance Company

Boston, Massachusetts

GENERAL AGENCY CONTRACT

THIS AGREEMENT, made and entered into at Boston, Massachusetts, this Twenty-eighth day of

June, 1938 by and between NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY of the City of Boston and Commonwealth of Massachusetts, of the first part, and Rolla R. Hays, Sr., Rolla R. Hays, Jr., and Raymond H. Bradstreet, of Los Angeles, California, doing business under the firm name of Hays and Bradstreet,

of the second part,

WITNESSETH, that the party of the first part hereby appoints the party of the second part its General Agents for the Counties of:

San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, San Diego, San Bernardino, Riverside and Imperial in the State of California,

subject to the right of the Company to change the territorial lines specified, to appoint other agents in said territory or to discontinue doing business in all or any part thereof.

SECTION 1. The said General Agents agree to devote ~~his~~^{their} entire time exclusively to the service of said Company, and neither directly nor indirectly to operate for any other Life Insurance Company, or engage in any other business or occupation; and that they will honestly and faithfully perform the duties of General Agents and conform to the rules of said Company, and the instructions and directions of its officers concerning its General Agencies and the method of conducting business, which are now in force or which may hereafter be given or adopted.

SECTION 2. The said General Agents ~~is~~^{are} hereby authorized to procure applications for Life Insurance Policies and Annuities and to forward the same to the Home Office of the Company for consideration; to deliver policies, premium receipts, premium notes and interest receipts upon the payment of the amount named therein, when the terms and conditions governing such delivery have been complied with; and to employ agents. The said General Agents shall be responsible to the said Company for all moneys, notes, receipts and policies collected by or passing through the hands of any and all agents or any other person employed by ~~him~~^{them}; and agree to hold the Company harmless from and against any and all claims of all agents and persons employed by ~~him~~^{them}, and such agents shall have no claim whatsoever against said Company for commissions or otherwise.

SECTION 3. The said General Agents shall keep complete and accurate records of all transactions, and shall enter all receipts and disbursements on the day of payment, in the cash-book provided by the Company; and shall keep all funds received or collected for or on account of said Company separate and distinct from personal or other funds, and deposited in such bank or trust company as shall be designated by the said Company, to ~~the~~^{their} credit as GENERAL AGENTS OF THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY; and shall not use such funds for any personal or other purpose whatsoever, but shall hold the same in trust for said Company, to be reported upon and transmitted to said Company in accordance with its rules and instructions.

SECTION 4. The said General Agents ~~is~~^{are} not authorized to make, alter or discharge contracts, waive forfeitures, or incur any liability on behalf of or against said Company in any case whatsoever.

SECTION 5. The said General Agents shall keep deposited with the Company a satisfactory bond of a Guaranty Company selected by the party of the first part, for the faithful performance of all duties pertaining to the Agency.

SECTION 6. All books, records, registers, documents and papers, also office furniture and fixtures, are and shall be the property of the Company, and shall at all times be subject to the use and control of its officers or other representatives, and, in the event of the termination of the Agency from any cause whatsoever, shall be turned over to said Company or its authorized agent, on demand.

SECTION 7. The Company will make available such a supply of canvassing and advertising documents, stationery, books, records and blanks as it may deem necessary to conduct properly the business of the Agency.

SECTION 8. The said General Agents shall not, nor shall any agent or other person in ~~his~~^{their} employ, be permitted to print, publish or distribute any advertisement, circular, statement or other document relating to the business or standing of the said Company, or any other Life Insurance Company, unless the same shall have been previously examined, approved and authorized in writing by an officer of the Company.

THE UNIVERSITY OF CHICAGO
LIBRARY
1850
CHICAGO, ILL.

THE UNIVERSITY OF CHICAGO
LIBRARY

CHICAGO, ILL.

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(Plaintiff's Exhibit No. 29)

SECTION 9. Subject to the provisions of this Agreement, the said Company hereby agrees to pay or allow the said General Agents on policies placed hereunder, on first year premiums actually collected and remitted by them a commission, as follows:

On LIFE POLICIES, continuous annual premium payments	55%
On LIFE POLICIES of 30 or more limited premium payments	55%
On LIFE POLICIES of 19 to 29 limited premium payments, both inclusive	50%
On LIFE POLICIES of 15 to 18 limited premium payments, both inclusive	40%
On LIFE POLICIES of 10 to 14 limited premium payments, both inclusive	30%
On LIFE POLICIES of 5 to 9 limited premium payments, both inclusive	20%
On LIFE POLICIES, single premium payment	5%
On NEW ENGLANDER 1-2-3 LIFE POLICIES	20%
On NEW ENGLANDER FAMILY INCOME POLICIES	50%
On ENDOWMENTS of 30 years and over, annual premium payments	50%
On ENDOWMENTS of 20 to 29 years, annual premium payments, both inclusive	40%
On ENDOWMENTS of 15 to 19 years, annual premium payments, both inclusive	30%
On ENDOWMENTS of 10 to 14 years, annual premium payments, both inclusive	20%
On ENDOWMENTS of 30 or more years, 20 limited premium payments	40%
On ENDOWMENTS of 25 or more years, 15 limited premium payments	35%
On ENDOWMENTS of 20 or more years, 10 limited premium payments	20%
On ENDOWMENTS of 10 or more years, single premium payment	5%
On ENDOWMENTS of 5 years, single premium payment	2 1/2%
On NEW ENGLANDER RETIREMENT INCOME POLICIES	According to Endowment Period
On 5 AND 10-YEAR TERM POLICIES	30%
On SINGLE PREMIUM ANNUITIES, with or without refund	3%
On RETIREMENT ANNUITIES, annual premium payments; ages 50 or under	22 1/2%
On RETIREMENT ANNUITIES, annual premium payments; ages 51-60 inclusive	20%
On RETIREMENT ANNUITIES, annual premium payments; ages 61 or over	15%
On Life and Endowment Policies which have an extra premium providing a deferred annuity, the first commission on that part of the premium providing for the annuity will be seven and one-half per cent; but on renewal premiums the schedule rate as per Section 10 below will be allowed on the combined premium, and upon the expiration of the renewal commission period the rate as per Section 11 will be allowed on the combined premium.	

Special rate to be made in each case on any other form of policy.

SECTION 10. Also a commission of seven and one-half per cent on the first to tenth renewals, inclusive, on policies on the Life and Term plans and on Endowments of twenty or more annual premium payments, and five per cent on the first to tenth renewals, inclusive, on Endowments of less than twenty annual premium payments, and five per cent on the first to ninth renewals, inclusive, on annual premium Retirement Annuities, placed by said General Agents when actually collected and remitted by them to the said Company.

SECTION 11-A. On policies placed by said General Agents hereunder and on policies which may be transferred to the Agency, upon which the renewal commissions payable under the provision of Section 10 hereof have expired: a collection commission of two and one-half per cent will be allowed as compensation upon premiums on Insurance Policies and two per cent upon premiums on annual premium Retirement Annuities, if and when collected at the request of, and actually remitted by them to, the Company, but not otherwise.

B. On policies issued through and now in force at the Agency, but not placed by said General Agents a collection commission of two and one-half per cent will be allowed upon premiums of issues prior to January 1, 1926 and bearing policy numbers below No. 547,100, and a collection commission of one per cent upon premiums on issues subsequent to January 1, 1926 and bearing policy numbers above No. 547,100 and upon annual premium Retirement Annuities, if and when collected at the request of, and actually remitted by them to, the Company, but not otherwise.

SECTION 12. When five or ten-year Term policies are changed to other forms after two years from the date of issue or renewal, or when New Englander 1-2-3 Life policies are automatically converted or are changed to other Life or Endowment forms after one year, first and renewal commissions will be allowed upon premiums on the new policy, according to the schedule of Sections 9 and 10 hereof; but if such change is made during the two-year or one-year period specified, the commission paid on the first premium of the original policy will be deducted from the commission payable on the first premium on the new policy.

SECTION 13. No commissions will be paid or allowed for the collection of interest; or on any premium for temporary insurance; or on any premium or premium note, or loan note deducted by the Company in settlement of any cash, paid-up insurance or extended insurance value, or matured endowment. No commission will be paid on amounts collected for difference in reserves to change any Life or Endowment policy or Annuity contract after the end of the first policy year.

SECTION 14. The commissions named in Sections 9, 10, 11 and 12 shall be in full for all services rendered said Company as General Agents. No extra charges shall be made for general or special services, except by the written agreement of said Company.



SECTION 15. The Company will pay medical examination fees. Taxes and license fees imposed by law or ordinance will be paid by the Company provided the amount is within such limits as may be adopted by the Company. All bills for the same must be sent to the Home Office for approval.

SECTION 16. The said General Agents will be allowed to charge in ^{their} accounts to the Company the sum of See Supplemental Agreement dollars per month for the payment of office rent and toward the payment of clerk hire, telephone, postage, exchange, light, heat, repairs to furniture and fixtures, and the cleanly and orderly maintenance of the Agency Office. No other expense of any kind or nature shall be charged to, or will be paid or allowed by, the Company; and the right is reserved by the Company to change said allowance at any time.

SECTION 17. It is hereby agreed by the said General Agents that when the lease of the Agency Office is made or held in ^{their} name, such lease will be transferred and assigned to the Company upon demand.

SECTION 18. It is expressly agreed between the parties hereto that in case said General Agents shall violate any of the conditions of this Agreement, or shall withhold or convert to ^{his own} use or for the benefit of others any moneys, securities, policies, premium loan notes, or receipts belonging to the said Company, this Agreement and any renewal or collection commissions and all claims whatsoever accruing hereunder to the said General Agents shall become forfeited and void, and said Agency shall at once become terminated without notice.

SECTION 19. The Company expressly reserves the right to terminate this Agreement at any time upon giving sixty days' notice in writing of its intention ^{so to do, and if all the conditions thereof have been faithfully complied with by the said General Agents} to do, and if all the conditions thereof have been faithfully complied with by the said General Agents, ^{they shall have the same right upon the same} notice, but not otherwise.

SECTION 20. In the event that this Agreement shall be terminated by either party hereto in accordance with the provisions of Section 19 hereof, or in case of the death of ^{any of} the said General Agents while this Agreement is in full force with its conditions unbroken in any particular, then in lieu of all payments, renewals and collection commissions stipulated herein, and in full settlement of all claims hereunder, there will be paid or credited to said General Agents ^{and to the legal representatives of any of them}, ^{their respective shares} renewals referred to in Section 10 aforesaid, a commission of six and one-half per cent on renewal premiums on policies on the Life or Term plan and on Endowments of twenty or more annual premium payments, and four per cent on Endowments of less than twenty annual premium payments and on annual premium Retirement Annuities; and the full schedule rate of commission on first year premiums which may become due after the termination of the agency on policies written before such termination; such commissions being payable only if, as, and when said premiums shall have been paid to the Company.

Calculation of commissions payable under this section will be made quarterly, and a certified list of policies upon the premiums of which commission is claimed by or on behalf of the General Agents or any sub-agent must be furnished to the Company at the termination of this Agreement.

SECTION 21. The Company may at any time offset against commissions due or payable to the General Agents under this Agreement any indebtedness due or to become due from ^{any of them} to the said Company; and in the event of the termination of this Agreement the Company is authorized to pay to any sub-agent any commission which may be due, or which may thereafter become due, from the General Agents to such sub-agent and to deduct such payments from any amount due the said General Agents under this Agreement; but nothing herein shall be construed as binding the Company to make such payments.

SECTION 22. Any assignment or attempted assignment of this Agreement, or of any of the claims or rights accruing hereunder by the said General Agents shall be void unless assented to in writing by the said Company.

This Agreement shall take effect the First day of August, 1955

IN WITNESS WHEREOF, the said NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY has hereto affixed its corporate name and seal by GEORGE L. HUNT, its Vice President, and the said General Agents ^{has} hereunto set ^{his} hand and seal the day and year first above written.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

by

George L. Hunt

Vice President.

Ruben R. J. Hay Jr.

General Agent

Ruben R. Hay Jr.

Raymond H. Bradstreet



(Plaintiff's Exhibit No. 29)

Dec. 1-98.

General Agency Contract.

NEW ENGLAND MUTUAL
LIFE INSURANCE COMPANY

WITH

Hays and Bradstreet

Effective Date. **August 1, 1938.**



(Plaintiff's Exhibit No. 29)

THIS SUPPLEMENTARY AGREEMENT, made and entered into this Twenty-eighth day of June, 1938 by and between the NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, of the City of Boston, and State of Massachusetts, of the first part, and Hays and Bradstreet, of the City of Los Angeles, and State of California, General Agents, of the second part, which is hereby made a part of and annexed to an Agreement between said parties, executed June 28, 1938 and subject to all the conditions, covenants, and agreements therein contained,

WITNESSETH, that said Agreement is hereby amended by adding to Section 9 thereof the following revised schedule of commissions, which shall supersede the original schedule as to policies submitted after the date of this Supplementary Agreement.

On LIFE POLICIES, continuous annual premium payments	55%
On LIFE POLICIES of 30 or more limited premium payments	55%
On LIFE POLICIES of 19 to 29 limited premium payments, both inclusive	50%
On LIFE POLICIES of 15 to 18 limited premium payments, both inclusive	40%
On LIFE POLICIES of 10 to 14 limited premium payments, both inclusive	30%
On LIFE POLICIES of 5 to 9 limited premium payments, both inclusive	20%
On LIFE POLICIES, single premium payment	4%
On NEW ENGLANDER 1-2-3 LIFE POLICIES	20%
On NEW ENGLANDER FAMILY INCOME POLICIES	50%
On ENDOWMENTS of 40 years and over, annual premium payments	50%
On ENDOWMENTS of 38 and 39 years, annual premium payments	49%
On ENDOWMENTS of 36 and 37 years, annual premium payments	48%
On ENDOWMENTS of 34 and 35 years, annual premium payments	47%
On ENDOWMENTS of 32 and 33 years, annual premium payments	46%
On ENDOWMENTS of 30 and 31 years, annual premium payments	45%
On ENDOWMENTS of 29 years, annual premium payments	44%
On ENDOWMENTS of 28 years, annual premium payments	43%
On ENDOWMENTS of 27 years, annual premium payments	42%
On ENDOWMENTS of 26 years, annual premium payments	41%
On ENDOWMENTS of 25 years, annual premium payments	40%
On ENDOWMENTS of 24 years, annual premium payments	39%
On ENDOWMENTS of 23 years, annual premium payments	38%
On ENDOWMENTS of 22 years, annual premium payments	37%
On ENDOWMENTS of 21 years, annual premium payments	36%
On ENDOWMENTS of 20 years, annual premium payments	35%
On ENDOWMENTS of 19 years, annual premium payments	34%
On ENDOWMENTS of 18 years, annual premium payments	33%
On ENDOWMENTS of 17 years, annual premium payments	32%
On ENDOWMENTS of 16 years, annual premium payments	31%
On ENDOWMENTS of 15 years, annual premium payments	30%
On ENDOWMENTS of 14 years, annual premium payments	28%
On ENDOWMENTS of 13 years, annual premium payments	26%
On ENDOWMENTS of 12 years, annual premium payments	24%
On ENDOWMENTS of 11 years, annual premium payments	22%
On ENDOWMENTS of 10 years, annual premium payments	20%
On ENDOWMENTS of 30 or more years, 20 limited premium payments	40%
On ENDOWMENTS of 25 or more years, 15 limited premium payments	35%
On ENDOWMENTS of 20 or more years, 10 limited premium payments	20%
On ENDOWMENTS of 10 or more years, single premium payment	4%
On NEW ENGLANDER RETIREMENT INCOME POLICIES	According to Endowment Period
On MULTIPLE INCOME POLICIES	According to Endowment Period
On 5 and 10-YEAR TERM POLICIES	30%
On SINGLE PREMIUM ANNUITIES, with or without refund	21%
On RETIREMENT ANNUITIES, annual premium payments; ages 50 or under	22%
On RETIREMENT ANNUITIES, annual premium payments; ages 51-60 inclusive	20%
On RETIREMENT ANNUITIES, annual premium payments; ages 61 or over	15%

On Life and Endowment Policies which have an extra premium providing a deferred annuity, the first commission on that part of the premium providing for the annuity will be seven and one-half per cent; but on renewal premiums the schedule rate as per Section 10 below will be allowed on the combined premium, and upon the expiration of the renewal commission period the rate as per Section 11 will be allowed on the combined premium.

Special rate to be made in each case on any other form of policy.

IN WITNESS WHEREOF, the said NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY has hereto affixed its Corporate name and seal by GEORGE L. HUNT, its Vice President, and the said parties of the second part have hereunto set their hands and seal the day and year first above written.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

By

George L. Hunt

Vice President.

Walter L. ...

General Agent

Walter L. ...



(Plaintiff's Exhibit No. 29)

This Supplementary Agreement, made and entered into this 3rd

day of **January** 19 **45** by and between the **NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY**, of the City of **Boston**, and State of **Massachusetts**, of the first part, and **-Hays & Bradstreet-** of the City of **Los Angeles** and State of **California**, General Agent, for **Southern California**

of the second part, which is hereby made a part of and annexed to an agreement between said parties, executed **June 26,** 19 **38** and subject to all the conditions, covenants, and agreements therein contained,

Witnesseth, that: The said General Agents will be allowed and are hereby authorized to charge for expenses stipulated in and subject to the provisions of Section 16 ten per cent (10%) of the first-year premiums collected and remitted in their accounts on life and endowment policies of ten or more annual premium payments and upon policies on the five-year and ten-year term plan and on the difference between the premium on the life and endowment policies and the premium on the five- or ten-year term policies when such term policies are converted, irrespective of year of conversion, and on the difference between the term premium and the life premium upon conversion of New Englander policies, irrespective of year of conversion, subject to the conditions hereinafter mentioned.

When policies are issued and placed on the Special Class basis, whether retained or re-insured, the total expense allowance which the Company will hereafter pay to the General Agents will be 7½% on first-year premiums collected. When all or part of policies issued and placed at standard rates are re-insured, the total expense allowance which the Company will hereafter pay to the General Agents will be 10% on first-year premiums collected on the following classes:

- a. The amount issued, but not in excess of the Company's retention limit, when the Company does not restrict the amount which it is willing to retain to less than its retention limit.
- b. The amount retained by the Company when the Company restricts the amount which it is willing to retain to less than its retention limit.
- c. The amount issued, but not in excess of \$10,000, when the amount is entirely re-insured and the Company carries no insurance on the life.

No expense allowance on risks involving re-insurance or Special Class business will be paid, except as provided above.

The above agreement is effective as of January 1, 1945.

IN WITNESS WHEREOF, the said NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY has hereto affixed its Corporate name and seal by

-George L. Hunt-

its Vice President,

and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY

George L. Hunt Vice President
Race R. Hays, Jr.
Raymond H. Bradstreet

[Endorsed]: Case No. 3930. New England vs. Lutz.
 Plf's Exhibit No. 29. Date 3/29/45. No. 29 in Evidence.
 Clerk, U. S. District Court, Sou. Dist of Calif. P. D.
 Hooser, Deputy Clerk.

[DEFENDANTS' EXHIBIT C]

Department of Health

CITY OF LOS ANGELES

DIVISION OF VITAL STATISTICS

CERTIFIED COPY OF LOCAL RECORD

This is to Certify that the attached is a full, true, and correct copy

of the certificate of Deathof Abe Lutz

which is on file in this office, and of which I am the legal custodian.

In Testimony Whereof witness my hand and seal of office, at Los Angeles,

California, this 24day of Jan, 19 45

Fee \$1.00

PAID

1

Gene M. Webb, M.D.

Registrar of Vital Statistics

By Salvatore

Deputy Registrar

No.

297261

(Defendants' Exhibit C)

1. FULL NAME Abe Lutz		DISTRICT NO. 1801 REGISTRATION NO. 8857	
2. PLACE OF DEATH (a) COUNTY Los Angeles (b) CITY OR TOWN Los Angeles (c) NAME OF HOSPITAL OR INSTITUTION 1012 So. Highland Ave. (d) IF NOT IN HOSPITAL OR INSTITUTION, GIVE STREET NUMBER OR LOCATION (e) LENGTH OF STAY (SPECIFY WHETHER YEARS, MONTHS OR DAYS) IN HOSPITAL OR INSTITUTION IN THIS COMMUNITY 33 Yrs IN CALIFORNIA 33 Yrs (f) IF FOREIGN BORN, HOW LONG IN THE U. S. A. 52 YEARS		3. USUAL RESIDENCE OF DECEASED a. STATE California b. COUNTY Los Angeles c. CITY OR TOWN Los Angeles d. STREET 1012 So. Highland Ave.	
4. SEX Male 5. COLOR OR RACE Cauc. 6. a. SINGLE, MARRIED, WIDOWED OR DIVORCED Married b. c. AGE OF HUSBAND OR WIFE IF ALIVE 63 YEARS		20. DATE OF DEATH MONTH May DAY 28 YEAR 1944 HOUR 11 P.M. MINUTE	
7. BIRTHDATE OF DECEASED (Unknown) AGE 65 Yrs Mos Days Hrs Mins		21. MEDICAL CERTIFICATE I HEREBY CERTIFY THAT I ATTENDED THE DECEASED FROM 5-16 TO 5-28 THAT I LAST SAW HIM in ALIVE ON 5-28 AND THAT DEATH OCCURRED ON THE DATE AND HOUR STATED ABOVE	
8. (a) IF VETERAN, NAME OF WAR No (b) SOCIAL SECURITY NO None		22. CORONER'S CERTIFICATE I HEREBY CERTIFY THAT I HELD AN AUTOPSY INSIDE A NATIONALLY REGISTERED MORTUARY IN THE DEPARTMENT OF THE DECEASED AND FURNISHED SUCH ACTION THAT DECEASED CAME TO DEATH ON THE DATE AND HOUR STATED ABOVE	
9. BIRTHPLACE Russia		IMMEDIATE CAUSE OF DEATH Acute Coronary Thrombosis - Myocardial Infarction -	
10. USUAL OCCUPATION Steel Business		DUE TO Myocardial Infarction	
11. NAME Joseph Lutz		MAJOR FINDINGS OF OPERATIONS None	
12. BIRTHPLACE Brown Russia		DATE OF OPERATION	
13. MAIDEN NAME Unknown		OF AUTOPSY None	
14. BIRTHPLACE Unknown Russia		23. IF DEATH WAS DUE TO EXTERNAL CAUSES, FILL IN THE FOLLOWING: (a) ACCIDENT, SUICIDE OR HOMICIDE? (b) DATE OF INJURY (c) WHERE DID INJURY OCCUR? (d) DID INJURY OCCUR IN OR ABOUT HOME OR FARM, IN INDUSTRIAL PLACE OR IN PUBLIC PLACE? (e) MEANS OF INJURY	
15. a. INFORMANT Edward Friedman b. ADDRESS 1745 S. 1st St. Los Angeles		24. CORNER'S OR PHYSICIAN'S SIGNATURE W. B. Rausch DATE 5-29-44	
16. a. PLACE OF BURIAL Forest Lawn Cemetery b. DATE OF BURIAL May 31, 1944		25. SIGNATURE OF DECEASED'S NEAREST RELATIVE Robert Lutz	
17. a. PLACE OF SIGNATURE Los Angeles b. SIGNATURE Charles J. Lutz c. LICENSE NO. 2304		26. ADDRESS 1908 Wilshire Blvd. Los Angeles	
18. a. FUNERAL DIRECTOR James J. Lutz b. ADDRESS 1908 Wilshire Blvd. Los Angeles		27. DATE May 31, 1944	

STATE OF CALIFORNIA DEPARTMENT OF PUBLIC HEALTH CERTIFICATE OF DEATH U. S. DEPT. OF COMMERCE BUREAU OF THE CENSUS

Case No. **3930**
New England vs. Lutz
Debt's EXHIBIT **C**
 Date **3/23/45** No. **C** IDENTIFICATION
 Date **3/23/45** No. **C** IN EVIDENCE
 Clerk, U. S. District Court, Sou. Dist. of Cal.
R. L. Hooser Deputy Clerk

No. **11180**
 UNITED STATES CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT
FILED
 NOV 10 1945
PAUL P. O'BRIEN
 CLERK

[DEFENDANTS' EXHIBIT D]

[Written]: Defts' Ex 1 for Iden. RMK Ex 4 for Iden.

November 16, 1942

Mr. Doane Arnold
Manager, Underwriting Department
New England Mutual Life Insurance Company
501 Boylston Street
Boston, Massachusetts

Re: Abe Lutz

Dear Doane:—

Mr. Stanley Leeds, a full time representative of the Equitable, has recently written some insurance on the life of the above Abe Lutz on which they issued their policy number 11568673.

Part of this business is going to be given to the New England Mutual, and as I understand it, there is some history, and as a consequence the local office of the Equitable wired their Home Office to turn all papers over to the New England Mutual, and in a wire just received the Equitable stated they would be glad to do so, but would prefer that our Home Office make this request of the Home Office of the Equitable. Would you, therefore, be kind enough to get in touch with them for the necessary papers, and in the meantime we shall hope to forward an examination on our blank completed by their chief examiner here, Dr. Waste.

(Defendants' Exhibit D)

I shall appreciate your usual courtesy on this, Doane, as it would seem to be quite a decent case, and we hope of course, to get as much as possible for the New England Mutual.

Yours very truly

HAYS & BRADSTREET

Harold P. Morgan

HPM:LM

Ass't. General Agent

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith, Clerk; by _____, Deputy Clerk.

[Written]: Defts' & Counter Claimant's Ex 2 for Ident. 3-2-45 W. H. Davis Notary Public

Dr. M. H. Rosenfeld
Los Angeles, Cal.

In making application for life insurance I find that I am unable to give sufficiently detailed information concerning my past medical history with particular reference to Physical Examination & Findings One Month Ago for
(Fill in name of illness or injury)

which I consulted you in.....

May I ask you to assist me by answering the questions listed below? This is a personal request from me and your courtesy will be appreciated. Please forward your reply in the enclosed envelope to the Medical Director of the Equitable Life Assurance Society.

Very truly yours,

.....
.....

Address

(Defendants' Exhibit D)

To the Physician or Hospital: Please detach this portion
of the form for your records.

ABE LUTZ

To the Medical Director
The Equitable Life Assurance Society of the United States
393 Seventh Avenue
New York, N. Y.

At the request of Abe Lutz I submit the following in-
formation regarding the illness for which I treated
him (her).

Diagnosis: -----

Brief History of Illness: (Please give dates)-----

Nature of Treatment: (Date of any operations)-----

Length of Treatment: -----

Date of Discharge: -----

Condition When Discharged: -----

Result of Any X-Ray Study, Laboratory Work or Special
Tests: (Including results of microscopic examina-
tion of any tissue removed by operation)

Blood sugar determination 115 Mill.

Nature of Any Other Condition for Which Patient Has
Consulted Me: -----

Date..... Signed.....M. D.

11-1603-LOS AW

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by, Deputy Clerk.

(Defendants' Exhibit D)

[Written]: Defendants' Ex 3 for Iden. RMK.

Boston, Massachusetts

November 19, 1942

EQUITABLE LIFE ASSURANCE SOCIETY
New York, N. Y.

WOULD APPRECIATE YOUR FORWARDING
COPIES OF PAPERS ABE LUTZ BORN 15 APRIL,
1878.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

DA:B

[Stamped]: Underwriting Dept. Nov. 19, 1942. A. M.
Fardy.

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by, Deputy Clerk.

[Written]: Defts. Ex 4 for Iden. RMK

NEW ENGLAND MUTUAL
Life Insurance Company [Crest] Boston, Massachusetts

Hays & Bradstreet, General Agents

609 South Grand Avenue

Los Angeles, California

Telephone: Tucker 1211

Rolla R. Hays, Sr.

Rolla R. Hays, Jr.

R. H. Bradstreet

Harold P. Morgan

Assistant General Agent

Harry W. Day

Office Manager

November 16, 1942

(Defendants' Exhibit D)

Mr. Doane Arnold
Manager, Underwriting Department
New England Mutual Life Insurance Company
501 Boylston Street
Boston, Massachusetts

Re: Abe Lutz

Dear Doane:—

Mr. Stanley Leeds, a full time representative of the Equitable, has recently written some insurance on the life of the above Abe Lutz on which they issued their policy number 11568673.

Part of this business is going to be given to the New England Mutual, and as I understand it, there is some history, and as a consequence the local office of the Equitable wired their Home Office to turn all papers over to the New England Mutual, and in a wire just received the Equitable stated they would be glad to do so, but would prefer that our Home Office make this request of the Home Office of the Equitable. Would you, therefore, be kind enough to get in touch with them for the necessary papers, and in the meantime we shall hope to forward an examination on our blank completed by their chief examiner here, Dr. Waste.

I shall appreciate your usual courtesy on this, Doane, as it would seem to be quite a decent case, and we hope, of course, to get as much as possible for the New England Mutual.

Yours very truly

HAYS & BRADSTREET

Harold P. Morgan

HPM:LM

Ass't. General Agent

The First Mutual Life Insurance Company

Chartered in America—1835

(Defendants' Exhibit D)

[Stamped]: Underwriting Dept. Nov 19 1942 A. M.
Fardy

[Letterhead of New England Mutual]

November 17, 1942

Mr. Doane Arnold
Manager, Underwriting Department
New England Mutual Life Insurance Company
501 Boylston Street
Boston, Massachusetts

Re: Abe Lutz

Dear Doane:—

On the 16th of November, I wrote you a letter regarding the above case, and I am now pleased to enclose application in the amount of \$13,000.00, which has been examined as I indicated by the Chief Examiner of the Equitable, Dr. Waste, and under the circumstances, I sincerely hope that his examination will be accepted. I found that it would have been impossible to have secured this business if we had insisted upon an examination by our own Chief Examiner.

You will notice that the request is made to date this policy to October 13th to save age 64, and you will note the further request that the policy be issued with an eleven month's pro-rate premium, and annually, thereafter.

In addition to this, will you be kind enough to have issued an additional contract of \$8,000.00 dated October 13th with a pro-rate premium to August 13th, 1943, and a \$5,000.00 policy dated October 13th, 1942 with a pro-rate premium to August 13th, 1943.

(Defendants' Exhibit D)

These latter two policies will be, if placed, accepted on the ownership form, two sons-in-law to be the applicant for such insurance, and the policies would be returned with applications correctly completed, substituted for the original.

This looks like a very fine piece of business, and I will appreciate your cooperation.

May I ask for a wire of approval?

Yours very truly

HAYS & BRADSTREET

Harold P. Morgan

HPM:LM

Enc.

The First Mutual Life Insurance Company
Chartered in America—1835

[Stamped]: Underwriting Dept. Nov 19 1942 A. M.
Fardy.

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by, Deputy Clerk.

[Written]: Defts Ex 5 for Iden RMK

December 1, 1942

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

609 South Grand Avenue

Los Angeles

California

ABE LUTZ APPROVED \$13,000. LETTER FOL-
LOWS REGARDING ADDITIONAL.

UNDERWRITING DEPARTMENT

SH:B

(Defendants' Exhibit D)

BOSTON, MASS., APRIL 8, 1943

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

609 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA

ABE LUTZ REGRET MUST DECLINE ACCOUNT
OF ADDITIONAL CONFIDENTIAL INFORMA-
TION RECEIVED SINCE ORIGINALLY ISSUED.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY.

MEDICAL

MR/GF

[Letterhead New England Mutual]

[Written]: Plaintiff's Ex 7 for Iden RMK

[Stamped]: Slip Apr—7-43 Apr 7 9 46 AM 1943
Control Dept. Assoc. Med. Director Apr 8-1943 Un-
derwriting Dept. Apr 8-1943 M. H. Jackson Apr 8-1943
Declined M.A.L. Answer Over G.F. Apr 8 1943

April 5, 1943

Dr. Frederick R. Brown
Associate Medical Director
New England Mutual Life Insurance Company
501 Boylston Street
Boston, Massachusetts

Re: Abe Lutz—#1,174369

Defendants' Exhibit D)

Dear Dr. Brown:—

Will you be kind enough to refer to the file in connection with the above case. The Agent informs us that due to the pressure of business that existed when this application was submitted, he was unable to follow through with the requirements that you desired, but is perfectly willing to go through with them now. We are wondering whether or not it would be more satisfactory to proceed in an effort to secure attending physicians's statement, or whether, because of this further lapse of time, you would prefer a blood sugar tolerance test made now by our own chemist.

We want to secure not only the original \$13,000 insurance asked for, but can effect delivery of that amount representing our limit at this age. In as much as this applicant will be sixty-five years old on the 15th instant, we would like to proceed as quickly as possible, and will appreciate your wire outlining requirements and amounts we will consider not later than Wednesday, the 7th instant.

Yours very truly

HAYS & BRADSTREET

Harold P. Morgan

HPM:LM

The First Mutual Life Insurance Company
Chartered in America—1835

(Defendants' Exhibit D)

[Written]: Defts Exhibit 8 for Iden RMK

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

Boston 17, Massachusetts

ATTENDING PHYSICIAN'S STATEMENT

.....
(Agency).....
(Date)

To Doctor,

(Name of physician) (Address)

Mr., of

(Name of applicant) (Address)

an applicant to this Company, states that he consulted you
on or about

....., for

(Date) (Reason)

To determine his insurability, the Company needs the
details.

Mr. authorizes

(Name of applicant)

you to give this information.

Please mail your reply direct to the Company at Bos-
ton, Mass. A fee of \$2.00 is allowed for this service.

HAROLD M. FROST, M. D.,

Medical Director.

Reply (If this space is inadequate, continue on back)

Defendants' Exhibit D)

1. Give dates of all consultations.
2. The signs and symptoms, your diagnosis and duration of illness.
3. What treatment?
4. Approximate date of cure.
5. The result of any laboratory investigation.
6. Has the above-named consulted you for any other condition than that indicated above? If so, give details.

.....
(Signature attending physician)

.....
(Date)

To Doctor:
(Name of physician)

.....
(Date)

I hereby authorize you to give the Medical Director of the New England Mutual Life Insurance Company any information he requests as to any and all consultations with you on my part.

.....
(Signature of applicant)

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by, Deputy Clerk.

(Defendants' Exhibit D)

[Written]: Defts Ex. 11 for Iden. RMK

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

Boston, Massachusetts

[Stamped]: Dec 2 1942

Attention: Hays & Bradstreet

From Department: Medical

✓

Subject: Abe Lutz—#1,174,369 for additional

Date: Dec. 14, 1942

We regret we are unable to consider further without a complete detailed statement from Dr. Rosenfeld and Dr. Lisner. If they jointly attended applicant and are fully acquainted with the facts, a statement from either may be satisfactory.

We should like full details:

Why were the doctors consulted? [Written]: Because
of ? ? ? ? ?

What were the symptoms? [Written]: none

What were the findings? [Written]: neg

What treatment or advice was given? [Written]:
none

What were the results? [Written]: Satisfactory

We are returning to you Dr. Rosenfeld's statement to the Equitable Life, as requested in your letter of December 8.

[Written]: Ex 1369. Miss Byington
H. M. FROST

m.

Medical Director.

Enclosures .

M.

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by, Deputy Clerk.

Defendants' Exhibit D)

[Written]: Defts Ex 12 for Iden RMK

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

501 Boylston Street, Boston

Attention: Messrs. Hays & Bradstreet

From Department: Medical [Stamped]: Jan 18 1943

Subject: Abe Lutz #1,174,369

Date: Jan. 14, 1943.

We regret to advise you that we are today removing this case from our pending file. We feel that sufficient time has now elapsed since our request for an attending physician's statement. We are, therefore, marking the application as incomplete and placing it in our closed file.

Yours very truly,

F. R. BROWN

Associate Medical Director.

IAS/AM

AM

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by _____, Deputy Clerk.

(Defendants' Exhibit D)

POSTAL TELEGRAPH

* * * * * * * *

[Written]: Defts Ex 13 for Iden RMK
S. NB 369 N.BB 348

Dec 29 PM 4 46
LA528B (FIGE) 11 SER=PNE BOSTON MASS
29 543P

NEW ENGLAND MUTUAL LIFE INS CO=
609 SOUTHIGRAND AVE LOSANGELES CALIF=
ABE LUTZ REGRET THAT THERE IS NO
CHANGE IN OUR REQUIREMENTS=

NEW ENGLAND MUTUAL LIFE INS. CO.

[Endorsed]: Filed Mar. 21, 1945. Edmund L. Smith,
Clerk; by, Deputy Clerk.

[Endorsed]: Case No. 3930. New England vs. Lutz.
Deft's Exhibit D. Date 3/28/45. No. D in Evidence.
Clerk, U. S. District Court, Sou. Dist of Calif. P. D.
Hooser, Deputy Clerk.

No. 11180.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ, as executor and executrix of the last will and testament of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

McLAUGHLIN, MCGINLEY & HANSON,

JOHN P. MCGINLEY

650 South Spring Street, Los Angeles 14,

Attorneys for Appellants.

WILLIAM E. BAUGH,

Of Counsel.

FILED

APR 11 1923

WILLIAM E. BAUGH,

CLERK



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No. 11180.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ, as executor and executrix of the last will and testament of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

This is an appeal by the defendant Harry Lutz from a judgment of the United States District Court for the Southern District of California, Central Division [I, 62] declaring a policy of life insurance issued by plaintiff (Appellee) to be void [I, 60], and formally cancelling and rescinding the policy [I, 62].

This appeal presents no question of jurisdiction of either this or the trial court. Appellee is a Massachusetts corporation; defendant is a resident of the County of Los Angeles, State of California, and the amount in controversy

exceeds the sum of \$3,000.00, exclusive of interest and costs. The suit was brought by appellee under Section 41, U. S. C. A. (Judicial Code, section 24, amended).

Appellant filed an answer and counterclaim to which answer was interposed by Appellee. The case was tried before Judge Ralph E. Jenney, now deceased, whose opinion was rendered on May 4, 1945 [I, 352], and the judgment appealed from was entered on June 14, 1945 [I, 62]. The notice of appeal was filed on August 28, 1945 [I, 66].

Statement of the Case.

On December 1, 1942 [II, 384], upon the written application of the Appellant, the Appellee Insurance Company issued, and on or about December 9, 1942 [II, 384], delivered its policy of life insurance No. 1,172,844 on the life of another, to-wit, Appellant's 64 year old father, Abe Lutz, who is referred to in the policy as the "insured," insuring the life of the *assured's* (Appellant's) said father for the policy face amount of \$13,000 and naming the *assured* Appellant, "applicant" therefor, the "beneficiary" and "the sole owner" of the policy which was made effective, and antedated, as of October 13, 1942.

By this appeal, Appellant seeks a review of the judgment in favor of the Appellee insurer on its complaint filed after the death of the "insured," for cancellation and rescission of the policy, notice of which was also given after the loss occurred. The Appellee insurer's complaint, as amended, alleged [I, 2], that the trial court found [I, 49], the policy void and formally cancelled and rescinded [I, 62] the same on the premise that the "insured" misrepresented and concealed facts concerning his health and

medical history which were material to the risk insured against; that the Appellee relied thereon and was misled to its prejudice thereby, and that the “insured” was not in that state of health prerequisite to the policy’s validity when the application therefor was approved and the first premium thereon was paid.

There is no claim or allegation in said complaint, no evidence offered to support and no finding made that the *assured* Appellant, the “applicant” for, “beneficiary” and “sole owner” of the policy, was a party to such, or any, alleged concealment or misrepresentation.

On November 14, 1942, Appellant, as the “applicant for insurance,” and his now deceased father, Abe Lutz, as the consenting “proposed insured,” signed the application which is identified as “Part I” and which contained no part of the alleged concealment or misrepresentations upon which said complaint, findings and judgment are premised. Appellant signed no other application or document other than said “Part I” [II, 405].

Two days later, on November 16, 1942, Appellant’s 64 year old father submitted himself to a physical examination by Appellee’s medical examiner [Finding V] who thereafter made his report to Appellee company [Ex. 27, II, 408a]. Appellant’s said father orally answered the printed questions with respect to his medical history in the separate document entitled “Part II” [II, 406] as said medical examiner propounded *his interpretation of them* to Appellant’s said parent, and, after said medical examiner in his own longhand wrote *his interpretation of the answers* thereto of the “insured,” in the blanks, after the printed questions. Appellant’s father *alone* signed said

“Part II” at the bottom thereof above a provision therein whereby Appellant’s father did

“* * * expressly waive * * * all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired, and I authorize any such disclosure.” [Ex. 27, II, 406.]

Said waiver of and authorization for such full disclosure executed by Appellant’s father is hereinafter referred to as the “insured’s waiver of privilege and authorization for full disclosure.”

Before the “insured” signed “Part II,” the medical examiner wrote therein as the answer of Appellant’s father to

Question 28: that the “insured” had been declined for insurance a few years before by Equitable Life;

Question 37: that the “insured” had been suspected of having sugar or albumen in his urine;

Question 32: that the insured’s weight had decreased about 15 pounds in the last two years;

Question 33: that the insured’s present weight had been maintained only about 3 months;

Question 36: that the “insured” had consulted and been physically examined by Dr. Maurice H. Rosenfeld of 1908 Wilshire Boulevard during the then preceding August, 1942.

At the same time, on November 16, 1942, when the “insured” and the only signer of “Part II,” affixed his signature to “Part II” below the “insured’s waiver of

privilege and authorization for full disclosure," the medical examiner knew that:

(a) During the physical examination referred to in "Question 36," *supra*, Dr. Maurice H. Rosenfeld checked the insured's heart [I, 218];

(b) the "insured" had a history of diabetes [I, 216];

(c) the "insured" had been rejected for insurance on account of sugar in his urine [I, 216];

(d) he, the medical examiner, had examined the "insured" several times before [I, 216].

On November 27, 1942, three days before the policy in suit was issued and 12 days before its delivery, Appellee was advised on receipt of a letter from the medical director of the Equitable Life Assurance Society [Ex. 27, II, 411-412] that:

(a) the "insured," in addition to Dr. Maurice H. Rosenfeld named by the "insured" in "Part II," had also been attended by Dr. Lissner who was not named or mentioned by the "insured" in said "Part II";

(b) Equitable refused to issue additional insurance on the life of the "insured" [Ex. 27, II. 412].

When the policy in suit was issued [II, 384] and over one week before it was delivered [II, 384], the Appellee knew that it did not have, was on notice and inquiry [II, 432] of Messrs. Hays & Bradstreet at 609 South Grand Avenue, Los Angeles, California, Appellee's "general agents" [I, 271], to secure:

(a) "a complete detailed statement from Dr. Rosenfeld and Dr. Lisner";

(b) "full details" with respect to:

1. "why were the doctors consulted"?
2. "what were the symptoms"?

3. "what were the findings"?
4. "what treatment or advice was given"?
5. "what were the results"? [Ex. D; II. 432].

Pursuant to Appellee's inquiry [Ex. D; II, 432] to its "general agents" [I, 271] in Los Angeles for "full details" with respect to "why" Doctors Rosenfeld and Lissner were consulted, what treatment or advice was given and what the symptoms, findings and results were, Mr. Harold Morgan, the brokerage manager [I, 310] of Appellee's said general agents, did not talk to Dr. Rosenfeld [I, 147] and it appears that he may have satisfied himself by merely talking to Dr. Rosenfeld's bookkeeper on the telephone inasmuch as Mr. Morgan in his own longhand [I, 328-330] wrote on Appellee's letter [Ex. D; II, 432] of inquiry the following:

"EX 1369"

which was Dr. Rosenfeld's telephone number [I, 146];

"Miss Byington"

which was Dr. Rosenfeld's bookkeeper [I, 146];

"Because of requirements of Equitable for
B. L. S. U."

which referred to blood sugar [I, 329] in response to the inquiry as to why the doctors were consulted;

"None"

[I, 329; II, 432] opposite: what were the symptoms;

"Neg"

[I, 330; II, 432] opposite: what were the findings;

"None"

[I, 330; II, 432] opposite: what treatment or advice was given; and

"Satisfactory"

[I, 330; II, 432] opposite: what were the results.

Automatically, as a custom, usage and routine, Appellee's "general agents" request a retail credit inspection on applications which are submitted to Appellee [I, 343], but in this instance the services of the Retail Credit Company's insurance inspector and investigator, Mr. Paul M. Arnold, were not employed by Appellee until the last week in June, 1944 [I, 238], approximately 30 days after Appellant's father died (May 28, 1944). The investigator, Mr. Brown, as the first step in his investigation, contacted Dr. Rosenfeld [I, 239] who answered all questions with respect to the "insured's" health and condition [I, 240].

Appellee is a member of the Medical Information Bureau of Cambridge, Massachusetts [I, 283], also known as "MIB" [I, 299], and during the months of November or December, 1942, obtained therefrom information "in code" [I, 283] concerning the "insured" which Appellee destroyed and was unable to produce at the time of trial [I, 284]. In January and March, 1943, and prior to the death of the "insured," Appellee received two other M.I.B. "confidential reports" with respect to the deceased [I, 298] which were not produced in court but which contained "confidential" information of such character as to cause Appellee "to refuse to proceed further" with the additional insurance [I, 298] requested concurrently [Ex. D; II, 426] with the application upon which the policy in suit was issued.

Before Appellee issued the policy in suit it made no investigation of the "insured's" previous insurance record [I, 286]. The reasons which prompted Appellee to *take a chance* without complete investigation, and issue the policy, notwithstanding the fact that Appellee was put

on notice and active inquiry [II, 432] of its "general agents" in Los Angeles [I, 271], is explained frankly, as a "risk" [I, 293] consciously taken and embraced by Appellee where the face amount of the policy is "under \$15,000" to avoid "expense" and "delay in issuing policies" [I, 293], by Appellee's medical director [I, 247], Harold M. Frost, M.D. [I, 246], who approved [I, 255] the application for the policy in suit, as follows:

"The reason for requesting detailed statements from Doctors Rosenfeld and Lissner arises from the fact that Medical Directors have learned from unfortunate experience that the statements of applicants as to their consultations with physicians must be evaluated with caution. Medical Directors are convinced that the average individual intends to be honest. However, we have learned that some applicants apparently attempt to conceal damaging information; that others have not understood the information as to their condition given them by their physicians and therefore have not considered it significant; that others have actually not been advised by their physicians as to the significance of serious signs or symptoms which the physician had discovered. Not infrequently a statement from the physician will prove that what appeared an insignificant consultation, from the information given by the applicant in his answers to questions in Part II of his application, was actually a serious matter, the physician having discovered signs and symptoms which would forbid issuance of life insurance at standard rates and might necessitate its issuance at substandard rates, or might necessitate rejection of the risk.

“As a practical procedure, considerations of expense in obtaining such statements, for which the physicians must be paid by the company, and the delay in issuing policies as a consequence of requesting such statements influence the Medical Director in formulating his policy as to how frequently and in what types of cases a physician’s statement will be required.

“In the case of applications for large amounts of insurance, a routine requesting of physician’s statements is necessary for the protection of the company as large amounts are at risk. As for small applications, amounts under \$15,000, within which range the great majority of applications fall, the routine requests are neither practical nor feasible because of excessive expense and undue delay in issuing policies.

“The only practical policy as respects applications for small amounts of insurance is to request physicians’ statements only when the applicant in his statements as to his medical history raises definite doubt as to his insurability. Further, it is common knowledge among medical directors that applicants at the older insurance ages, the late fifties and the sixties, must be scrutinized much more carefully as to medical history and condition of health than in the case of applicants of younger ages. Companies generally do not issue to older applicants as much insurance as to younger applicants, because in general the older applicants are not as good physical ratings as the younger applicants.

“In the case of Mr. Lutz, when I reviewed his application I noted that he was in his sixty-fifth year,

a definitely advanced insurance age. He applied for \$13,000 of insurance. At the same time a request was made for an additional \$13,000 of insurance. For a man as old as Mr. Lutz, \$13,000 of insurance would be considered only a moderate amount to be issued by a company the size of the New England Mutual Life Insurance Company, while \$26,000 of insurance would be considered a large amount to be retained by such a company.

“As I had no reason to doubt the accuracy of the statements of Mr. Lutz as to his medical history, I, depending upon his honesty, believed that I could safely approve his application for \$13,000 of insurance without asking for statements from Doctors Rosenfeld and Lissner. His physical examination was satisfactory, and I had no other information of an unfavorable nature as respects his medical history or health. I therefore approved his application for \$13,000.

“I believed, however, that, in view of his advanced insurance age, that for his age the amount of \$26,000 life insurance was a large amount to be issued by my company, and the fact that he had admitted consulting Dr. Rosenfeld, and to my knowledge had consulted Dr. Lissner, that it would be advisable to request the detailed statement as recited in [Ex. D; II, 432], whereupon this statement was requested.” [I, 292-295.]

Appellant in his application (“Part I”), agreed that “this application, including Part II, a copy of which shall be attached to the Policy when issued, shall become a part

of every Policy issued hereon" [Ex. 27; II, 405]. The policy in suit provides that said "Part I" and "Part II," which includes the "insured's waiver of privilege and authorization for full disclosure," are incorporated in and expressly made a part of the insurance contract [Ex. 3].

The policy was delivered to Appellant [Finding VI], "the sole owner" [Ex. 3] and "beneficiary" appointed "without right of revocation by the insured" [Ex. 3]. Appellant paid Appellee all premiums required to be paid [Finding XX and XXV] *i. e.*, two annual payments.

The "insured" died May 28, 1944 [Finding VIII], one year, 7 months and 15 days after the effective date of the policy, and the Appellee filed its original complaint on October 11, 1944, and the amended complaint [I, 2], which added paragraph XVI [I, 14-15] thereof (alleging that at the date of Appellee's approval of the application, and issuance of the policy in suit and receipt of the payment of the first premium thereon, Appellant's father (the "insured") was suffering from heart trouble, dizziness, fainting spells, palpitation of the heart, shortness of breath, pain and pressure in the chest, nausea, indigestion, and various other ailments), was filed January 31, 1945 [I, 21] *i. e.*, over two years after date [Ex. 3], issuance [Ex. 1; II, 384] and delivery [Ex. 1; II, 384] of the policy [Ex. 3] which was incontestable after it had "been in force for a period of two years from its date of issue." [Ex. 3].

Specification of Errors.

Appellant's concise statement of points on appeal is printed in the appendix hereto. Summarized, the errors relied upon in this appeal are that:

(1) The trial court erred in denying Appellant's motion to dismiss [I, 195];

(2) The trial court erred in admitting, over Appellant's objection, testimony of the insured's attending physician relating to the health and physical condition of the insured [I, 99-100];

(3) The trial court erred in decreeing rescission and cancellation of the policy for concealment and fraud, attributed to the "insured", with respect to his health and medical history [I, 60-63];

(4) The trial court erred in failing to find that Appellee:

(a) Waived its right:

(1) To complain of concealment or fraud;

(2) To claim the insured was not in good health when the policy was delivered;

(b) Was estopped:

(1) To deny liability on the ground of fraud or concealment;

(2) To claim that the "insured" was not in good health when the policy was delivered.

(5) The trial court erred in

Finding V; in finding that:

(1) Appellee's medical examiner accurately recorded:

(a) the insured's answers to questions contained in "Part I" or "Part II";

(b) the insured's answers to Appellee's medical examiner's interpretation of said questions;

(2) The insured's answers were a part of said application, *i. e.*, "Part I";

(3) The insured read said application [I, 50-51; Finding V].

Finding IX; in finding that:

(1) The insured in "said application" ("Part I") or in "Part II" represented to Appellee that the insured had "never" suffered from indigestion, dizziness or fainting spells, palpitation of the heart, or pain or pressure in the chest;

(2) The insured *ever* suffered from "indigestion", "fainting spells", or "pain in the chest" [I, 52; Finding IX].

Finding XI; in finding that:

(1) The insured, within 5 years prior to the date of either "Part I" or "Part II", had consulted or been treated "by physicians for dizziness or fainting spells";

(2) The insured had ever been told unequivocally that he was suffering from angina pectoris;

(3) The insured's physician ever prescribed medicine to relieve pain in the "chest";

(4) The insured ever suffered pain in the "chest" for any cause or reason whatsoever;

(5) The matters in subdivisions (1), (2), (3) and (4) immediately above mentioned were concealed or undisclosed in "Part II" [I, 52-53; Finding XI].

Finding XII; in finding that:

The matters found in Findings IX and XI with respect to which it is hereinabove urged that the court erred, were known to the insured when he signed "Part II" [I, 53; Finding XII].

Finding XIV; in finding that:

The insured had knowledge of the terms or provisions of the policy in suit [I, 54; Finding XIV].

Finding XV; in finding that:

Prior to the insured's death, Appellee had no knowledge, information or notice that the insured had failed to disclose the fact that he had theretofore consulted or been examined by physicians other than Dr. Rosenfeld [I, 54; Finding XV].

Finding XIX; in finding that:

(1) Said insured was not in good health at the time said policy was delivered, or the first premium thereon was paid;

(2) Said insured knew he was not in good health or was suffering from angina pectoris at the time said application was signed or delivered or at the time said policy was issued or delivered, or at the time the first premium thereon was paid [I, 56; Finding XIX].

Finding XXI; in finding that:

(1) At the time "Part I" or "Part II" was signed, said insured knew:

(a) the contents thereof;

(b) the answers to the questions therein contained concerning the insured's health or medical history were not true;

(c) matters of fact concerning the insured's health or medical history were concealed or misrepresented in or by "Part I" or "Part II";

(2) The insured did not correctly or truly answer all or any questions asked him by the Appellee's medical examiner or by Appellee's agent who filled in the application [I, 57; Finding XXI].

Finding XXII; in finding that:

(1) Said insured did not furnish Appellee's agents or representatives with true or correct information

on all or any matters as to which information was requested by said agents or representatives;

(2) Said insured did misrepresent or conceal matters of fact concerning which the insured was interrogated [I, 57; Finding XXII].

Finding XXIII; in finding that:

(1) Appellee, or its representatives who contacted the office of the insured's physician, did not have the opportunity of obtaining full, true or correct information from such physician regarding the physical condition or health of said insured;

(2) Appellee did not have ample opportunity to ascertain the true facts concerning the health or medical history of said insured prior to the death of said insured;

(3) Appellee is not estopped to rescind or cancel said policy or to refuse payment of the proceeds thereof;

(4) Appellee is not precluded from relief by reason of its delay;

(5) Appellee rescinded said policy promptly upon discovery of the facts which it now claims were concealed from it [I, 57-58; Finding XXIII].

Finding XXIV; in finding that:

(1) Appellee did not have the opportunity of obtaining any information from the physician of the insured regarding the latter's physical condition or health;

(2) At the time of signing "Part II," the insured did not inform Appellee's medical examiner that Dr. Maurice H. Rosenfeld had given the insured a complete physical examination [I, 58-59; Finding XXIV].

(6) The trial court erred in its

Conclusion I, that: Appellee is entitled to judgment cancelling and rescinding the policy and

declaring it void, and requiring that the original be delivered to Appellee for cancellation [I, 60; Conclusion I].

Conclusion II, that: Appellee is entitled to judgment declaring that Appellant has no rights and Appellee has no duties, liabilities or obligations under the policy except that Appellant is entitled to recover from Appellee only \$2,-523.43 as restoration to him of all premiums and considerations by him paid to Appellee [I, 60; Conclusion II].

Conclusion III, that: The policy failed to become effective because the insured was not and knew he was not in good health when the application was approved, the first premium paid and the policy delivered [I, 60; Conclusion III].

Conclusion IV, that: Appellee promptly rescinded and was entitled to rescind the policy by reason of misrepresentation or concealment of facts, known to the insured or material to the risk, which the insured ought to have communicated or disclosed in the application [I, 61; Conclusion IV].

Conclusion V, that: Appellee has not waived and is not estopped to assert its right to rescind the policy [I, 61; Conclusion V].

Conclusion VI, that: The matters alleged in Appellee's amendment to its original complaint (Paragraph XVI of the Amended Complaint) is not barred by the incontestable clause in the policy [I, 61; Conclusion VI].

Conclusion VII, that: Appellant take nothing by his counterclaim filed herein [I, 61; Conclusion VII].

ARGUMENT.

Summary.

POINT I.

The Appellee Insurer Cannot Repudiate the Policy, Deny All Liability Thereunder, and at the Same Time be Permitted to Stand on, Exercise Rights Under, and be Permitted to Enjoy the Benefits of a Provision Inserted in the Policy for Its Benefit.

It is Appellant's position: that after the "insured's" waiver of privilege and authorization for full disclosure," contained in the document known as "Part II," was merged into and by the terms of the policy itself was expressly made a part thereof, the Appellee insurer's *subsequent* exercise of its power to elicit testimony from the "insured's" attending physicians (disclosing upon the trial of this case, over Appellant's objection, information relating to the medical history, health and physical condition of the "insured") was an exercise of a right accruing to Appellee under the policy or contract of insurance, the exercise of which was inconsistent with Appellee's position that the contract of insurance, the policy, was void; That Appellee cannot repudiate the policy, declare it void, and support its prayer for cancellation and rescission of the insurance contract, by standing on a provision in that contract empowering it to elicit from the deceased "insured's" attending physicians privileged communications acquired by them to enable them to prescribe

treatment for the “insured.” This subject matter is treated in the argument under the following headings:

(a) The Parties to the Insurance Contract;

(b) The Policy, Including “Part I” and “Part II,” Does Not Provide, Either Expressly or by Implication, That Appellant’s Rights Are Predicated Upon the Conduct of the “Insured”;

(c) Neither Appellant Nor the Heirs or Personal Representatives of the Deceased “Insured” Could Waive the Latter’s Privilege With Respect to Confidential Communications to His Attending Physicians to Enable Them to Prescribe Treatment for Him;

(d) After the Policy Was Issued, the “Insured’s” Waiver of Privilege Was an Integral Part of and Provision in the Policy for the Appellee’s Benefit, and Its Rights and Powers Thereunder May Not Be Exercised and Enjoyed by It Concurrently With Its Affirmative Repudiation of and Prayer for Cancellation and Rescission of the Contract in Its Entirety;

(e) The Trial Court Erred in Admitting the Testimony of the Deceased “Insured’s” Attending Physicians Over Appellant’s Objections. In the Absence of Such Testimony, There Is No Evidence in Support of the Judgment.

POINT II.

The Appellee Is Precluded by Waiver and Estoppel.

It is Appellant's position: that his father, the "insured," gave true and correct answers to Appellant's medical examiner; that any erroneous answers, all written by and in the long hand of Appellee's medical examiner, to the printed questions in "Part II," were the result of and occasioned by said medical examiner's misapprehension of either the printed question in "Part II," or the answer thereto made by the *illiterate* "insured"; that the "insured's" vindication of fraud, misrepresentation, concealment and intention thereof, is established beyond cavil by his having given Appellee, in "Part II," the name and address of his attending physician, Dr. Maurice H. Rosenfeld, waived all privilege and affirmatively authorized all physicians or other persons who had attended or examined him to fully disclose to Appellee all knowledge and information, including the information which, after the "insured's" death, Appellee did secure, and proved in open court as the only evidence which appellee had or produced in support of the allegations in its complaint herein; that Appellee waived its right to the information which it claims was concealed from it, and is estopped to assert that it was misled or defrauded, inasmuch as Appellee was given the name and address of the attending physician of the insured and authority to elicit a full disclosure from said physician of precisely the same facts which after the death of the "insured" were introduced in evidence through the testimony of said attending physician

in support of Appellee's action to declare the policy void, and inasmuch as Appellee did get in touch with the office of said physician through its local general agent, and thereafter waited until it had received two annual premiums from Appellant and thereafter waited until Appellant's father, the "insured," died before it elected to and did communicate with said physician, from whom Appellee then readily elicited a complete and full disclosure. This is disclosed under the headings:

(f) All Answers to the Printed Questions in Part II of the Application Are Written by and in the Longhand of the Medical Examiner and Represent His Interpretation of That Which He Considered the Material Portion of the Insured's Answers to the Medical Examiner's, in One Instance, At Least, Admittedly Erroneous, Interpretation of the Printed Questions.

(g) The Appellee Had Placed At Its Disposal the "Exact Source" of Information From Which It Could Have Obtained Full and Complete Information on Everything It Now Claims Was Withheld From, and Misrepresented to, It.

(h) There Was No Fraud or Concealment.

POINT III.

Insured in Possession of Requisite Good Health.

It is Appellant's position that there is no competent evidence with respect to the state of health of the "insured" when the application was approved, the policy was delivered, or when the first premium thereon was paid; and that the burden of proving that the "insured" was not in that state of health prerequisite to the validity of the insurance contract is upon the Appellee as the insurer. This is discussed under the following heading:

(i) Appellee Has Not Sustained the Burden of Proof, and There Is No Competent Evidence, With Respect to Any Unfavorable State of the Insured's Health When the Application Was Approved or When the First Premium Was Paid or When the Policy Was Delivered.

(a) The Parties to the Insurance Contract.

The insurance contract and policy in suit is not a contract with the "insured" therein named, as is usually and ordinarily the case. The policy was *about* the "insured," but not *with* him; it is a contract between Appellee, as the insurer, and Appellant as "applicant" [II, 405] for "beneficiary" [II, 405], and "the sole owner" [I, 39] of the policy the person to whom the policy was delivered [Finding VI] and by whom all (two annual) premiums were paid [Finding XXV].

Appellant's father, the now deceased "insured" merely *consented* that his life might be the subject matter of a

life insurance contract between Appellee, as the “insurer,” and Appellant. The “insured” did *not* sign the application as “the applicant” therefor; he signed “Part I” (the application) merely as the “proposed insured” [II, 405]. Appellant signed *only* “Part I” and as the “applicant for insurance” [II, 405].

The Appellant, and not the “insured,” is a party, other than appellee, to the insurance contract here involved. The policy on its face purports to be and is made with Appellant. It was procured and paid for by and delivered to Appellant as “the sole owner” [I, 39] thereof. The “insured” had no rights under the policy. Appellant was the *assured* and was the only party to the contract, other than Appellee, who had any rights therein or thereunder.

Connecticut Mutual Life Ins. Co. v. Luchs (1883),
108 U. S. 498; 27 L. Ed. 800; 2 Sup. Ct. 949;

Brockway v. Connecticut Mutual Life Ins. Co.
(1887), 29 Fed. 766;

Worrell v. Life & Casualty Ins. Co. (La. 1937),
172 So. 788, reaffirmed in 175 So. 434;

Millard v. Brayton (Mass. 1901), 59 N. E. 436;
Cyrenius v. Mutual Life Ins. Co. (N. Y. 1895),
40 N. E. 225;

Whitehead v. N. Y. Life Ins. Co. (N. Y. 1886),
6 N. E. 267;

44 C. J. S. 997, Sec. 238, Note 47.

In the *Whitehead* case, *supra*, where each of three policies on the life of the husband recited that the consideration was paid by the wife, and the money was to be paid to her, the court said:

“These contracts purport upon their face to be contracts with the wife as the party assured, and not

at all with the husband, who stands in the policy as simply the life insured; his conduct and death furnishing the contingencies upon which the liability of the insurer is made to depend. As was tersely expressed in the argument, the contract was about the husband, and not with him."

In the *Cyrenius* case, *supra*, the court said:

"The fact that the father signed the application with the son is not a circumstance of much significance as against the language of the policy itself. The defendant, before entering into the contract, needed to be informed in regard to the age, health and general history of the person whose life was the subject of the risk. No one could furnish that but himself. This was the main purpose of the father's signature to the application. * * * The contract having been made with George in his own name for his own benefit, he alone * * * is entitled to sue upon or enforce the defendant's promise."

The "insured" signed Part I (the application) as the "Proposed Insured," thereby *consenting* that his life might be the "subject of the risk" in a life insurance contract between Appellee and Appellant. The contract purports on its face to be and it is made with Appellant as the party assured, and not at all with the "insured" who stands in the policy as simply the life insured, the "insured's" death furnishing the contingency upon which the liability of the Appellee insurer is made to depend.

The Appellee was in the business and wanted to write and the Appellant wanted to buy the policy in suit, and it may be said that the insured's *consent* that his life be the subject of the risk, evidenced by his signing "Part I," was equally for the benefit of both of the contracting parties, *i. e.*, Appellant and Appellee. However, even if it be

arbitrarily assumed that the insured's signing of "Part I" were for the benefit of Appellant, the fact remains that there is no fraud, concealment or misrepresentation contained in "Part I."

Whether "Part I" was signed for the benefit of both of the contracting principals, Appellee and Appellant, or only for the benefit of Appellant, the fact remains that "Part II," the "insured's" medical history and authorization for full disclosure to Appellee of all information acquired by his attending physicians, including Dr. Rosenfeld, was, if not equally for the benefit of both, for the *sole* benefit of Appellee. It surely was *not* contemplated that the "insured's" medical history and waiver of privilege and express authorization for the revelation of privileged communications to Appellee by the "insured's" attending physician, Dr. Rosenfeld, was included in the *application*, as such, for Appellant's benefit.

Before Parts I and II became a part of the contract by the issuance of the policy, "Part I" thereof was an offer (in which the "insured's" prerequisite *consent* thereto was included) by Appellant to enter into a contract. Two days later, the "insured" *alone* submitted to a physical examination, gave his medical history and signed "Part II" including the waiver of privilege and express authorization for the revelation of privileged communications to Appellee .

The "Insured's" waiver of privilege was included in the application, *as such*, for a purpose in connection with the *application*, as such, and not solely that it might become a part of the contract when the policy, of which it was contemplated that it would become a part, was issued, to the end that it would be used only to defeat liability on the policy after the loss occurred.

(b) The Policy, Including "Part I" and "Part II" Does Not Provide, Either Expressly or by Implication, That Appellant's Rights Are Predicated Upon the Conduct of the "Insured."

Appellant's application for insurance on the life of his father, the now deceased "insured," is "Part I" [II, 405]. Appellant did not sign "Part II" [II, 406]. "Part II" bears the "signature of the person examined," *i. e.*, the "insured," who signed the same two days after he, as the "proposed insured," and Appellant, as the "applicant for insurance" signed "Part I."

While Appellant, as "applicant for insurance," in his application ("Part I"), agreed that it, "including Part II" should be attached to the policy when issued and become a part thereof, nevertheless, Appellant did not underwrite the accuracy of, or endorse or give any warranty as to the truthful character of, the representations contained in "Part II."

The contract in suit provides that it, the policy, "Part I" and "Part II" are merged and "constitute the entire contract between the parties." Thus, the application, as such, became *functus officio* when the policy was issued, and thereupon became a part of the contract.

While the policy provides (emphasis added) that "all statements made by the *Insured* or in his behalf, in the absence of fraud, shall be deemed representations and not warranties;"

and further provides that

"no such statement shall be used in defense to a claim unless contained in the application and unless a copy of such application is attached to" the policy when issued,

nevertheless, the converse of the latter provision is not stated and does not appear, viz.: the policy *does not provide* that such statements *may be used* in defense to a claim in such a case as this where the “insured” is not a principal contracting party and the contract is between the *insurer* and the *beneficiary*. The “insured” in the instant case *had no rights* under the policy and signed “Part II” only to waive rights and not to acquire any.

With respect to the provision

“* * * All statements made by the insured or on his behalf, in the absence of fraud, shall be deemed representations and not warranties; * * *” [Ex. 3].

it is pertinent to note that, inasmuch as the “insured” was not a principal contracting party, no statements were made, and nothing was said or done, “in his behalf”; and any fraudulent statement made by or attributed to him (which by reason of its fraudulent, actual or assigned, character would be declared a warranty rather than a representation under the above quoted provision of the policy), would merely constitute and be a warranty by one who, having no rights under the policy could forfeit no rights thereunder.

If the “insured” had been the “applicant” for the policy and thus one of the principal contracting parties, any fraudulent statement made by him in *his* application, “Part I” or in *his* medical history, “Part II,” would have vitiated the contract as a *matter of law* for a breach of warranty

as defined by the above quoted excerpt from the policy. The above quoted excerpt only defines the circumstance under which a statement or representation will become a warranty. The law, not the policy in suit, determines the legal consequences that flow from a breach of warranty made by one of the contracting parties. Fraud of the “insured” or a breach of warranty by him, *had he been one of the principal contracting parties*, would have vitiated the contract *as a matter of law* without any contract to that effect and there is no contract to that effect in the case at bar; that is *implied in law* in every contract as between the contracting parties.

In the instant case, as in all cases, if the fraud of, or a breach of warranty by, a third party (the “insured” in the case at bar), who is not one of the principal contracting parties, is to invalidate the contract, the policy by its own terms must expressly so provide inasmuch as such a provision is *not* implied in law and the contract of insurance is, under well recognized principles of law, to be liberally construed in favor of the *assured* and strictly construed against the insurer.

While the policy also provides that it is issued, among other things, “in consideration of the application” (even though the word “application” be erroneously construed to include “Part II” as well as “Part I”), nevertheless, it does not provide that the policy is issued in consideration of the “applicant’s,” *i. e.*, Appellant’s statement or warranty that the statements or warranties of the “insured” in “Part II” are true or correct.

Appellant is not a third party beneficiary, and he relies on no contract made by the "insured." Appellant relies on his own contract with Appellee under which the "insured" waived certain rights but acquired none.

The law provides that a breach of warranty by one of the contracting parties entitles the other to rescind. The law does not provide that a breach of warranty by a third person (the "insured") will entitle either of the contracting principals to rescind in the absence of a contractual provision to that effect.

(c) Neither Appellant Nor the Heirs or Personal Representatives of the Deceased "Insured" Could Waive the Latter's Privilege With Respect to Confidential Communications to His Attending Physicians.

Appellant did sign limited waivers after his father's the "insured's," death, while Appellee was investigating the claim. These waivers, however, were limited and for the purpose of adjustment and settlement of the claim, and were legally insufficient under California law to overcome Appellant's objection *upon the trial* to the admission of privileged communications between the deceased "insured" and his attending physicians.

Aetna Life Ins. Co. v. McAdoo, 106 Fed. (2d) 18.

Under the law in California, the heirs of the patient cannot waive the privilege.

Estate of Flint (1893), 100 Cal. 391..

Under the law in California, personal representatives of the patient cannot waive the privilege.

Harrison v. Sutter Street Ry. Co. (1897), 116 Cal. 156.

While the *Harrison* case, *supra*, was decided before California Code of Civil Procedure, Section 1881, was amended to provide that the institution of an action for wrongful death constitutes a waiver, nevertheless, the case is directly in point here and the amendment mentioned does not change the law in the situation here before the court inasmuch as the instant action is not one to recover for a wrongful death.

In the *Harrison* case, the personal representative of the decedent brought the action for the decedent's wrongful death. The trial court admitted, over defendant's objection, the testimony of a physician who treated the deceased during his lifetime, to prove that the injuries received while in a collision caused his death.

The Supreme Court held that that was error, saying:

"Under the principles announced in the *Estate of Flint*, 100 Cal. 391, 34 P. 863, the evidence should have been excluded. While the precise question here presented—whether, after the death of the patient, his legal representative may waive the objection which the statute gives, in terms, to the patient alone—was not there directly decided, it was, nevertheless, fully considered and discussed, and the meaning of the statute in that regard very clearly indicated in the following language: 'The question of waiver of the privilege by the personal representative or heir of

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the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York, section 836, provides that the privilege is present unless "expressly waived by the patient." The California provision contains the words "without the consent of his patient." It will thus be seen that the provisions are in effect the same.

The courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege and when such patient is dead the matter is forever closed. *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1; *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874. * * *

This construction is not unreasonable in view of the peculiar terms of our statute, and is undoubtedly fully supported by the New York authorities referred to in the case just cited; and, since our statute seems to be framed closely after that of New York, the construction given the latter by the courts of that state should have great weight with us in interpreting the meaning of our own."

Subdivision 4 of Section 1881 of the *California Code of Civil Procedure* announces the "policy of the law" and the rule with respect to privileged communications between a physician and his patient as follows:

"There are particular relations in which it is the *policy of the law* to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

“(1) * * *

“(2) * * *

“(3) * * *

“(4) A licensed physician or surgeon cannot, without the consent of his patient, *be examined in a civil action*, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; * * *.” (Emphasis added.)

In the case of *In re Flint*, 100 Cal. 391, at page 396, the Supreme Court said:

“*This provision of law rests upon a sound public policy.* Its object and purpose is to enable the patient to make a full statement of his physical infirmities to his physician, with the knowledge that the law recognizes the communications as confidential, and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure. To him, the considerations are even more weighty that the privilege remain inviolate after he has gone to his grave, for his good name is left behind deprived of his protecting care.” (Emphasis added.)

In the case of *Kramer v. The Policy Holders Life Insurance Ass’n.*, 5 Cal. App. (2d) 380, the court said in this connection that:

“Our state has proclaimed its attitude in favor of liberal construction. In the case of *McRae v. Erickson*, 1 Cal. App. 326, at pp. 331-332, the court says: ‘But to give to the statute this narrow construction would equally exclude from its application many if not most of the answers to questions usually put, and properly and necessarily put, by competent physicians

to patients in cases of this kind, in order to enable them to act for their patients. This, we think, would be to defeat the obvious purpose of the act, which, it is said, "*is to facilitate and make safe full and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammelled by apprehension of their subsequent and enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient.*" (*Will of Bruendl*, 102 Wis. 47, 78 N. W. 169.) Hence, it is said in the case cited * * *: "The seal placed on the lips of the physician only relates to 'information necessary to enable him to prescribe for such patient as a physician.' " *The tendency of all courts has been and should be toward liberal construction of these words to effectuate the purpose of the statute.'* "

In the case of *Turner v. Redwood Mutual Life Ass'n.*, 13 Cal. App. (2d) 573, 576, the court in this connection, states that:

"In approaching the question we must bear in mind two well-settled rules of construction in California. (1) *That the provisions of subdivision four of section 1881 of the Code of Civil Procedure should be liberally construed in favor of the patient* (*Kramer v. Policy Holders etc. Assn.*, 5 Cal. App. (2d) 380 (42 Pac. (2d) 665); *McRae v. Erickson*, 1 Cal. App. 326 (82 Pac. 209)), and, (2) *that as the application and insurance policy were both prepared by the insurance carrier, and the provisions here in question are invoked to forfeit the policy, their terms should be strictly construed against it.* (*Witherow v. United American Ins. Co.*, 101 Cal. App. 334 (281 Pac. 668).)" (Emphasis added.)

(d) After the Policy Was Issued, the “Insured’s” Waiver of Privilege Was an Integral Part of, and Provision in, the Policy for the Appellee’s Benefit; and Its Rights and Powers Thereunder May Not Be Exercised and Enjoyed by it Concurrently With Its Affirmative Repudiation and Prayer for Cancellation and Rescission Thereof.

The “Insured” in the instant case executed a waiver in “Part II,” in words and figures as follows:

“* * * I expressly waive to such extent as may be lawful, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired, and I authorize any such disclosure.” [II, 406.]

The policy in suit made the application a part of the contract, in words and figures as follows:

“This policy and the application, a copy of which is attached to and made a part of this policy constitute the entire contract between the parties. All statements made by the insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties; and no such statements shall be used in defense to a claim unless contained in the application and unless a copy of such application is attached to this policy when issued. * * *” [I, 41.]

Appellant, in "Part I" (the application) the only document signed by him, agreed that:

"* * * This application, including Part II, a copy of which shall be attached to the policy when issued, shall become a part of every policy issued hereon; * * *" [I, 44.]

Accordingly, therefore, the only valid waiver of privileged communications entitling the Appellee to introduce testimony of the "insured's" attending physician with respect to the "insured's" medical history, health and physical condition, was a part of the policy itself, and an integral part thereof. After the waiver became merged into the contract, the insurer's subsequent exercise of its power to elicit information from the insured's attending physicians with respect to privileged matter was an exercise of a right accruing to Appellee under the contract. It is a well recognized rule that

"The insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit."

Grant v. Sun Indemnity Co. (1938), 11 Cal. (2d) 438, 440.

and cases there cited.

Austin v. Hallmark Oil Co. (1943), 21 Cal. (2d) 718, 727 (5);

10 Cal. Jur., Sec. 25, p. 645.

(e) **The Trial Court Erred in Admitting the Testimony of the Deceased Insured's Attending Physicians Over Appellant's Objections. In the Absence of Such Testimony, There Is No Evidence in Support of the Judgment.**

The testimony of the insured's attending physicians, Dr. Rosenfeld and Dr. Seech, admitted over Appellant's objections, was also error because such evidence was hearsay insofar, at least, as the statements of the "insured" to the doctors were concerned.

Yore v. Booth, 110 Cal. 238.

The propriety of the application of the rule of law stated in *Yore v. Booth*, *supra*, is emphasized in the case at bar for the reason that in the *Booth* case, the *third party beneficiary* was the plaintiff suing, and she was merely the object of the insured's bounty under a contract of insurance which the insured made with the insurance company, while in the case at bar, the Appellant, in his own behalf and for his own benefit, rather than the insured, entered into the insurance contract with the Appellee insurer.

In the *Booth* case the court said, at pages 240, 241 :

"* * * A person who procures a policy upon his own life, payable to a designated beneficiary, although he pays the premiums himself, and keeps the policy in his exclusive possession, has no power to change the beneficiary, unless the policy itself, or the charter of the insurance company, so provides. In other words, it is held that the beneficiary named in the policy, although he has parted with nothing, and is simply the object of another's bounty, has acquired a vested and irrevocable interest in the policy, which

he may keep alive for his own benefit by paying the premiums or assessments if the person who effected the insurance fails or refuses to do so.”

In the *Booth* case, the defendant, to avoid liability, urged that the insured falsely answered questions in the application with respect to his age, and offered evidence of the insured’s *prior* statements inconsistent with the answers in the insured’s application. This evidence was rejected on the ground that it was hearsay and the Supreme Court affirmed the judgment of the trial court on that ground, saying at pages 241, 242:

“* * * Any declarations of the deceased, not made at the time of procuring the policy, or as part of the *res gestae*, were *hearsay* and incompetent. * * *”
(Emphasis added.)

- (f) **All Answers to the Printed Questions in Part II of the Application Are Written by and in the Longhand of the Medical Examiner and Represent His Interpretation of That Which He Considered the Material Portion of the Insured’s Answers to the Medical Examiner’s Interpretation, and in One Instance Admittedly Erroneous Interpretation, of the Printed Questions.**

The insured was Yiddish, was Jewish, read Hebrew but didn’t read English well. The evidence showed, the court said, that he didn’t read documents but he understood them when they were read to him, and he always had important documents read to him. Lawyers by whom he had been advised testified that, when they did anything for him, they read the documents to him or that someone came in and read them to him and then he exercised his judgment predicated upon what he heard [I, 359-360].

In propounding his interpretation of the printed questions in Part II to the “insured,” the medical examiner sat across the desk from the “insured” facing him [I, 202]. All answers written in Part II were written in longhand by the medical examiner [I, 201]. The insured wrote nothing on Part II other than his own signature [I, 201]. After the medical examiner completed all the questions he turned the document around and asked the “insured” to sign it [I, 222].

The medical examiner did not record all of the insured’s answers or such of the insured’s answers as the medical examiner thought were “immaterial” [I, 215]. Some of insured’s answers omitted in “Part II” were included in the medical examiner’s confidential report [I, 214-15, 222]. The medical examiner did not ask all of the printed questions in “Part II” correctly, *e. g.*, subdivision “B” of question 35 indicates that the insured answered that he had *never* suffered from “insomnia.” The question as printed is: “Have you ever suffered from: Insomnia?” The answer written by the medical examiner is: “No.” *The “insured” made no such reply* to the question as printed. Actually, the “insured’s” reply was: “yes” to the medical examiner’s erroneous interpretation of the question, *viz.*: in interpreting that printed question and propounding it to the “insured,” the medical examiner asked the “insured,” and here we quote the record testimony of the medical examiner:

“I asked him (meaning the insured) if he slept well. He (meaning the insured) said ‘yes.’ That answer would be ‘No’ for insomnia” [I, 213].

The medical examiner's mistake in this respect is very natural and in no sense surprising in retrospect when consideration is given to the *form* of the printed question which appears as Number 35 in "Part II" to wit:

Have you ever suffered from :					
35 (Give details under 44)	A. Indigestion?	No.	B. Insomnia?		No.
C. Nervous strain or depression?	No.	D. Overwork?	No.	E. Dizziness or fainting spells?	No.
F. Palpitation of heart?	No.	G. Shortness of breath?	No.	H. Pain or pressure in the chest?	No.

It is obviously easy to *not read*: "Have you *ever* suffered from:" (emphasis added) before each of the eight (8) subdivisions of the above reproduction of number 35 of "Part II". However, that is precisely the admission of that which the medical examiner did with respect to subdivision "B" thereof [I, 213]. Perhaps the medical examiner's admission in this regard was an inadvertence while on the witness stand. If it was merely an inadvertence, it demonstrates how easily it can be and probably was slipped into with respect to the other seven subdivisions. If it can be so easily slipped into in open court when the witness's attention to the matter is concentrated and he is on the alert, it is obvious that the same inadvertence is more probable in the press of routine office procedure and expedition.

In further corroboration of the probability that the medical examiner failed to read "Have you ever suffered from:" before all of the 8 subdivisions of "35," is the striking coincidence that all the answers are "No," which is comprehensible if the medical examiner asked "*Do* you suffer from": or "do you *now* suffer from:" before each of the 8 subdivisions. On the other hand, it is *incredible*

that a man 64 years of age would say, or believe it credible to say, or that Appellee or its medical examiner or its medical director would believe that during all of his life of 64 years the insured had *never* suffered from "indigestion," "insomnia," "nervous strain or depression," "overwork," "dizziness or fainting spells," "palpitation of heart," "shortness of breath" or "pain or pressure in the chest." It is preposterous that Appellee should have believed or relied upon a statement that any person 64 years old, who had a history of diabetes, sugar or albumen in his blood and previously rejected for insurance, *never* in 64 years had suffered from *any* of the maladies named.

Some parts of the answers in "Part II" are not even interpretations of answers of the "insured," and on the contrary represent answers furnished by the medical examiner himself. This is demonstrated in several instances, *e. g.*, 36B of "Part II" requests the "insured" to "give reasons, name of practitioner and details under 44" if the "insured" had consulted or been examined by a physician or other practitioner within 5 years. Pursuant thereto, the medical examiner wrote under "Special Information" at 44 in his own longhand:

"Dr. Maurice H. Rosenfeld, 1908 August 1942 Physical examination and blood sugar determination report was normal."

In explanation of the source of his information concerning and the meaning of "1908" in the last quotation above, the medical examiner explained as follows on his direct examination:

"Q. His (Dr. Maurice H. Rosenfeld) address, 1908 Wilshire Blvd? A. Yes.

Q. Did you just fail to put in 'Wilshire Boulevard'? A. That's right. [I, 216.]

Q. You did not make an error; you just failed to put in 'Wilshire Boulevard'? A. I omitted it, yes.

* * * * *

Q. The court has suggested that the full address of the doctor was not listed on your item 44. Does that refresh your memory as to whether or not Mr. Lutz (the insured) said he had consulted Dr. Maurice H. Rosenfeld at 1908 Wilshire Boulevard? A. No, that's the office address of the doctor he consulted.

Q. From whom did you get the office address of Dr. Maurice H. Rosenfeld? A. I knew it. That's where his office was." [I, 217.]

(g) The Appellee Had Placed at Its Disposal the "Exact Source" of Information From Which It Could Have Obtained Full and Complete Information on Everything It Now Claims Was Withheld From, and Misrepresented to, It.

The "insured" gave Appellee the name of his attending physician, Dr. Maurice H. Rosenfeld, whose testimony, introduced over Appellant's objection in the trial of this case, demonstrated that he was thoroughly conversant with and readily disclosed every item of fact with respect to every item of alleged fraud, concealment and misrepresentation upon which Appellee relies and the judgment is premised.

The insured's concurrent waiver of privilege and express authorization for the revelation to Appellee of all privileged communications by "any physician or other person who has attended or examined me," obviously included Dr. Rosenfeld and placed at Appellee's disposal the "exact source" of information from which it could have obtained,

and after the “insured’s” death it did obtain, full and complete information on everything Appellee now claims was withheld from it.

The testimony, admitted over Appellant’s objection, of Dr. Maurice H. Rosenfeld, the “insured’s” attending physician, showed that *if Appellee had inquired of Dr. Rosenfeld, under the “insured’s” waiver of privilege in “Part II,” it would have received and elicited from him prior to the issuance of the policy in suit, the following information, to wit (in the order of the “insured’s” consultations with the doctor):*

1. First consulted by insured on January 16, 1937 [I, 101] who complained of dizziness, vertigo and inability to get out of bed [I, 102]. While the doctor diagnosed the condition as “probable slight” stroke which he “suspected as being very mild” and found some hardening of the arteries or arteriosclerosis and advised rest [I, 103], he did not tell the insured that he had suffered or sustained a stroke; the insured was told “that his general condition was satisfactory” but that the “question of a possible stroke had to be considered in view of the symptoms and the eye ground findings” [I, 134] made by an eye specialist, Dr. Stephen Seech, with whom Dr. Rosenfeld communicated directly [I, 124-125]. The insured had no pains [I, 142].

(Over Appellant’s objection [I, 156], Stephen G. Seech, M. D., specializing in ophthalmology [I, 155] with whom Dr. Rosenfeld communicated directly [I, 124-125], testified that he was consulted by the “insured”: on January 15, 1937 [I, 155], complaining that two days earlier he awakened with a dizzy head and was nauseated [I, 156].)

2. On January 19, 1937, Dr. Rosenfeld saw the "insured" again and the treatment was discussed. That was the last time Dr. Rosenfeld saw the insured for a number of years [I, 135].

3. On June 1, 1942, over 5 years after the last previous consultation, Dr. Rosenfeld next saw [I, 135] and examined [I, 105] the "insured" at which time he gave the "insured" a complete physical examination, made an electrocardiographic study and further study of the "insured's" blood, blood sugar, blood count and urinalysis. The doctor found the "insured" had an elevated abnormal blood sugar; blood pressure slightly elevated; a mild coronary ischemia [I, 105] which "is transitory" [I, 106] while the "probable" narrowing of the coronary arteries is chronic and "probably" progressive. The diagnosis was "probably" angina pectoris "probably" due to the coronary artery narrowing. The "insured" was advised to curtail activities, reduce weight by diet, "to improve this potential diabetic condition" and was given nitroglycerine, (sometimes prescribed for high blood pressure) [I, 135], for relief of pain [I, 106 & 137], which the "insured" for the first time complained of getting around his heart [I, 142] and which the "insured" thought were "gas" pains [I, 136]. The doctor's "suspicions" were that the "insured" had "mild" angina pectoris. The symptoms "were very mild" [I, 136]. The diagnosis of angina pectoris was "suspected" [I, 107], but it was Dr. Rosenfeld's policy, when he found a condition involving a suspicion of heart infirmity, not to make any statements which would make the patient unduly apprehensive [I, 119, 135]. The "insured" was also told about his "potential diabetic condition" [I, 107].

4. On June 3, 1942, Dr. Rosenfeld advised the "insured" that there was some abnormality in the cardio-

gram, not seen in the previous studies, which indicated that the pains of which the insured complained were due to his heart and "suggested" angina pectoris [I, 111]. In his testimony Dr. Rosenfeld said he found excessive sugar in the insured's blood on "one" occasion which he identified as this occasion, *i. e.*, June 3, 1942, [I, 145] although he previously testified he found on June 1, 1942, that the insured had an elevated abnormal blood sugar [I, 105].

5. On June 5, 1942, the "insured" had no complaints [I, 107]. The doctor made no examinations [I, 137].

6. On June 12, 1942, the "insured" said he had been feeling better than he had on the previous visits. He did not complain of pain, pressure in the chest or dizziness [I, 137].

7. On July 6, 1942, the "insured" stated he was feeling very much better; he said he was much improved [I, 138] and had no complaints [I, 115]. While the doctor "suspected the possibility of an acute coronary occlusion" and continued to believe that the "insured" had arteriosclerosis and angina pectoris [I, 116], nevertheless, he did not tell the "insured" what his diagnosis and conclusions were [I, 117]. The doctor testified that said diagnosis and conclusions were "just for my own information and a follow up for further diagnostic evidence" [I, 117]. The electrocardiograms taken on this date showed definite improvement and the doctor so advised the "insured" and recommended a "little vacation" [I, 139].

8. On August 7, 1942, the "insured" had no complaints and no pains [I, 140]. The doctor made a blood sugar test, found it to be normal, and so advised the "insured" [I, 140]. The examina-

tion and discussion that day “was primarily referable to the patient’s diabetic problem” and the doctor told the “insured” “that his blood sugar was essentially normal” [I, 118]. Having in mind the “insured’s” age, 64, it was the doctor’s opinion that the “insured” was in a good state of health “except for the pains and slight electrocardiograph changes” [I, 140].

9. On August 11, 1942, the last time the doctor saw the insured before November 16, 1942, when the latter signed the application [I, 144], the “insured” had no complaints; he was re-examined and another electrocardiogram was taken. The doctor advised that although his suspicion was the same, nevertheless “there was no increase in impairment noticed” [I, 118]. The overall picture was that the “insured” was improving; he was better. From June 5, 1942, to August 11, 1942, he had improved [I, 141]. His blood pressure [I, 144] and blood sugar were normal [I, 145]. He was recovered from the pain [I, 150]. The appearance of the “insured” was that of a normal appearing man in every way [I, 144].

On April 7, 1944, or 19 months later, Dr. Rosenfeld in his office next [I, 143], and for the last time, saw the “insured” before his fatal illness [I, 144]. Dr. Rosenfeld did not see [I, 143] nor prescribe any medicine for [I, 144] the “insured” from August 11, 1942 to April 7, 1944 [I, 143-144].

Dr. Rosenfeld further testified that the insured died of “an accute attack of coronary thrombosis” [I, 119], which probably occurred several hours before his death [I, 143], but was sent to the hospital for an acute duodenal ulcer, *i. e.*, ulcer of the stomach [I, 120]. In all of the doctor’s examinations, there were no symptoms which could be as-

cribed to coronary thrombosis [I, 144]. Normal, healthy appearing people suffer from fatal attacks of coronary thrombosis without any previous symptoms and Dr. Rosenfeld could not determine in August, 1942, from any examination that he could or did make as a heart specialist, whether or not the insured had coronary thrombosis [I, 143].

It is possible for a person to have mild angina pectoris and thereafter effect a complete recovery. Many times a person will have all the symptoms of mild angina and, over a period of time and treatment, can completely recover [I, 149].

While, over Appellant's objection [I, 122-123], Dr. Rosenfeld stated that it was his "belief" that the "insured" had arteriosclerosis and angina pectoris during the 39 day period between Nov. 1, 1942 and Dec. 9, 1942 [I, 122-123], nevertheless, he did not see the "insured" or prescribe any medicine for him during the over 19-months period between August 11, 1942 to April 7, 1944 [I, 143-144] and this evidence of Dr. Rosenfeld with reference to said 39 day period should have been, and the trial court thought that it was, excluded as is demonstrated in the court's opinion where Judge Jenney, speaking of the evidence elicited from Dr. Rosenfeld, said:

"The testimony limits the information obtained by Dr. Rosenfeld from the deceased to that period of time prior to November 16, 1942" [I, 355].

Dr. Rosenfeld testified that during the months of November and December, 1942, and January, 1943, his office address was 1908 Wilshire Boulevard; telephone number was EXposition 1369; his bookkeeper's name was Miss Byington [I, 146] and that during that period he did not

[I, 148] receive any letters or communications from Appellee, New England Mutual Life Insurance Company of Boston, a corporation, with reference to the health, condition or treatment of the "insured" [I, 147-148] but that shortly after the "insured's" death, *i. e.*, subsequent to May 28, 1944, Dr. Rosenfeld received a form from Appellee to fill out [I, 148].

Dr. Rosenfeld thought he was in his own office [I, 151] when he filled out the certificate of death [Ex. C] which certified that the insured's cause of death was "acute coronary thrombosis" of only one day's duration; "angina pectoris" of a duration of "1 yr +" and duodenal ulcer of a duration of "2 Mo. +" [II, 420].

The "insured's" complaint of "gas" pains had nothing to do with "indigestion". There is no evidence in the record that the "insured" suffered from "indigestion". Dr. Rosenfeld explained (emphasis added) that when a "gas" pain "occurs on effort or on emotion, it becomes obvious that *the stomach is not the thing at fault*, but the heart. However, most patients who complain of pain or a peculiar sensation that is hard for them to describe, and they usually say it is gas pains primarily because of belching, and they say, 'I feel badly.' *This is a very common fallacy* and the differential point is that gas pains usually are associated in close relation to the intake of food, while the gas pain as caused by heart disease is related to emotion and strain" [I, 126].

While the "insured" complained of pain on June 1, 1942 [I, 142], which Dr. Rosenfeld said was due to the

heart [I, 107] and not the stomach [I, 126], which the "insured" considered a "gas" pain [I, 136], nevertheless the fact remains that the "insured" never had any condition which was diagnosed as "indigestion" or "palpitation of the heart." Unless pain in the "heart" is synonymous with pain in the "chest," the "insured" never had any pain in the chest and certainly he had no condition diagnosed as pain or pressure in the "chest."

The appellee was in possession of facts which put it on notice and inquiry and which, if pursued, would have given it actual knowledge and full and complete information concerning everything it now claims was withheld from and misrepresented to it. Its failure to make such inquiry, when it could have conveniently done so, constitutes notice of that which the inquiry would have disclosed, and this constitutes a waiver of all right to complain that such information was withheld from or misrepresented to it.

An insurance company may be charged with knowledge of facts which it ought to have known.

Columbian Nat. Life Ins. Co. v. Rodgers, 116 F. (2d) 705, citing

Supreme Lodge K. P. v. Kalinski, 163 U. S. 289, 41 L. Ed. 163.

In the *Columbian National Life Insurance Co.* case, *supra*, the beneficiary brought the action on a \$10,000 policy issued by the defendant insurance company on Feb. 5, 1935, where the insured died less than 6 months later, on August 4, 1935. The defendant insurer claimed that

the insured made false and fraudulent representations in his application in response to questions as to whether he had ever been declined insurance. The evidence showed:

1. The insured had previously applied to and was declined insurance by John Hancock Mutual Life Ins. Co.;
2. After the John Hancock Co. declined the issuance of a policy, information that it had the insured's application, and some other company has created a record against him, was given to members of the Medical Information Bureau ("MIB") without stating whether John Hancock Co. had issued or declined to issue a policy;
3. The above MIB information was in defendant's possession and before its proper agents when it issued the policy after previously having notified its agent that its delay on the application was because it was investigating Applicant's previous insurance record.
4. There was no evidence as to the investigation the defendant made but it was established that defendant made no investigation of John Hancock Co. which latter company imparted no information to the defendant prior to the latter's issuance of the policy in suit.

The court held that the defendant was put upon inquiry by information before it when it issued the policy and was estopped to assert that it was without knowledge concerning the facts involved in the previous unsuccessful application to obtain insurance.

Keeping in mind the fact that in the instant case the contract was between the Appellee insurer and the *assured* Appellant, and not with the latter's father, the so-

called "insured," the following sections of the Insurance Code demonstrate the impropriety of permitting the insurer to complain of the third party's (the "insured's") alleged concealment or misrepresentation:

PRESUMED KNOWLEDGE.

"Each party to a contract of insurance is bound to know:

- (a) All the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated.
- (b) All the general usages of trade."

335 *California Insurance Code.*

WAIVER OF RIGHT TO INFORMATION.

"The right to information of material facts may be waived * * * by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated."

336 *California Insurance Code.*

MATTERS NOT REQUIRED TO BE DISCLOSED EXCEPT
UPON INQUIRY.

"Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

- 1. Those which the other knows.
- 2. Those which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant.
- 3. Those of which the other waives communication.
- 4. * * *
- 5. * * *

333 *California Insurance Code.*

Paraphrasing the above Insurance Code sections:

The Appellee insurer is bound *to know* the matters which “are open to” Appellee’s “inquiry equally with that of the” Appellant. (335 Insurance Code.)

Appellee’s right to information of material facts were waived by its neglect to make inquiries with respect thereto until after the loss occurred where such facts were distinctly implied in other facts communicated to Appellee with reference to diabetes, previous application for insurance rejected, consultation with heart specialist whose name was given together with express waiver of privilege and authorization for full disclosure (336 Insurance Code).

Appellant, *even if he were* conversant therewith, is under no duty to communicate information to Appellee with respect to matters which Appellee, in the exercise of ordinary care, ought to know, in the absence of Appellee’s direct inquiry *of Appellant* with respect thereto (333 Insurance Code).

REQUIRED DISCLOSURES.

“Each party to a contract of insurance shall communicate to the other, in good faith, all facts *within his knowledge* which are or which he believes to be material to the contract and as to which he makes no warranty, *and which the other has not the means of ascertaining.*” (Emphasis added.)

332 *California Insurance Code.*

Paraphrasing the above quoted Section 332, Appellant was under a duty to communicate to Appellee all facts *within Appellants knowledge* which Appellee did not have “the means of ascertaining.” Clearly, the Appellee had

“the means of ascertaining” from Dr. Rosenfeld all of the facts and information which it now claims was misrepresented to or withheld from it, and *there is no allegation or finding that such information was within Appellant’s knowledge.*

In the *Columbian National Life Insurance Co.* case, the beneficiary was suing on a contract between the insurer and the “insured” and as to which the plaintiff was only a third party beneficiary. In the case at bar, Appellant is suing on his own contract.

The case of *Turner v. Redwood Mutual Life Ass’n*, 13 Cal. App. (2d) 573 (hearing denied June 26, 1936), approved the doctrine of waiver and estoppel applicable in the case at bar. The insurance company in the *Turner* case, in the language of the decision (p. 575):

“* * * sought to relieve defendant from liability under its policy because of *alleged fraud* on the part of the *insured* in making *untrue answers* in her *application* for the policy and in an application for its reinstatement made July 10, 1934. Defendant *asserts* that Mrs. Turner had suffered from *twenty-three ailments during the period between October 18, 1925, three years prior to the date of the application*, and the date of her death, and that these were *concealed* from defendant constituting *fraud* on her part voiding the insurance. It sought to support this defense by the *evidence* of the *physicians* who had *attended Mrs. Turner*. The trial court excluded the evidence of these witnesses under the provisions of subdivision four of Section 1881 of the Code of Civil Procedure. Defendant maintains that the provisions of this section were waived by Mrs. Turner by the quoted paragraph in her application

for insurance and that the testimony of the physicians who had treated her was therefore admissible.” (Emphasis added.)

On page 578 of the *Turner* case, the court said:

“She gave the names of her attending physicians and defendant could have ascertained the exact nature of her illness and treatment had it sought that information before it issued its policy. There is nothing to show that the operation was not a complete success and that she had not ‘fully recovered’ from that illness as stated in the application.” (Emphasis added.)

There, as here, the information which the insurance company claimed was withheld from it could have been obtained from the doctors whose names were listed on the application. In holding that the insurance company had waived any misstatement in the application and was estopped from asserting the purported fraud, the court said on page 578:

“Defendant had placed at its disposal the exact source from which it could obtain the information which it now maintains was withheld from it. It did not choose to make any inquiry but issued its policy with extreme promptness, to say the least, and accepted deceased’s money for six years, during all of which time defendant led her to believe she had a valid and enforceable policy of insurance on her life. Under such circumstances defendant should not be permitted to come into court after death had sealed the insured’s lips and prevented her from explaining, if she could, why she did not mention an operation in 1926, when she did mention an illness and treatment by physicians which, we conclude from the evidence and proffer of proof occurred at the same time as the operation. The illness and some treatment, though

not the correct organ involved, were disclosed, and only the fact of an operation to effect a cure was withheld. *As defendant made no investigation when it should and could have, and as it issued its policy of insurance, accepted Mrs. Turner's money for six years and lulled her into the secure belief that she had a valid policy of life insurance, it must be held that it waived the misstatement in the application and is now estopped from asserting the purported fraud.*" (Emphasis added.)

In *Columbian Nat'l Life Ins. Co. v. Rodgers*, 116 F. (2d) 705, 707, the court said in this connection:

"An insurance company may be charged with knowledge of facts which it ought to have known. See, *Supreme Lodge K. P. v. Kalinski*, 163 U. S. 289, 16 S. Ct. 1047, 41 L. Ed. 163. Knowledge which is sufficient to lead a prudent person to inquire about the matter, when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed."

(h) There Was No Fraud or Concealment.

Appellee claims, and the trial court, by finding XI, found [I, 52-53], that the insured concealed from it information to the effect that

Within 5 years the insured on numerous occasions other than in August, 1942, had consulted and been examined by physicians, had electrocardiograms taken, medicine prescribed to relieve heart pains, received treatment for and been told by his physician that he had angina pectoris and should curtail his activities,

by the insured's response, in the medical examiner's long-hand under item 44, to the direction in item 36 B to "give

reasons, name of practitioner and details under 44” if the “insured” had consulted or been examined by a physician or other practitioner *within 5 years* [I, 44], to wit:

“Dr. Maurice H. Rosenfeld 1908 August 1942 physical examination and blood sugar determination report was normal.” [II, 406; I, 44.]

This criticism is wholly unwarranted, and there is no support in law or fact for such a finding for the reason that question 36A (answer in quotation), viz:

-
- 36 A Have you consulted or been examined by, a physician or other practitioner within 5 years?
“Yes”
- B If so, give reasons, name of practitioner and details under 44
-

and particularly subdivision “B” thereof by a proper interpretation, and we don’t know how the medical examiner read or interpreted it to the insured, does *not* request:

(1) That the insured state all reasons which may have prompted *all* consultations or examinations by *all* physicians or other practitioners over the whole 5 year period; or

(2) That the insured specify how many times in the then last 5 years he had consulted or been examined by a physician or other practitioner; or

(3) That the insured specify all or any diagnoses made and all or any treatments received over the whole 5 year period or any part thereof; or

(4) That the insured specify whether electrocardiograms were taken or how many were taken over the 5 year period; or

(5) That the insured name *all* physicians and other practitioners whom he consulted or by whom he was examined; or

(6) That the insured explain *all* or any prognoses made, recommendations offered, prescriptions written or medicines prescribed; or

(7) That the insured elaborate all or any symptoms, pains, or anxieties that had prompted each or every consultation with or examination by each or every physician or practitioner whom he had consulted or been examined by during the entire 5 year period.

It is Appellant's position that question 36, as properly interpreted, was correctly answered without concealment either in fact or legal contemplation when the medical examiner in his own longhand wrote:

(1) The word "yes" in response to subdivision question "A" thereof, to wit: "Have you consulted or been examined by a physician or other practitioner within 5 years?"; and

(2) In response to the subdivision "B" direction therein ("If so, give reasons, name of practitioner and details under 44"), the following:

44 Special Information:

"36. Dr. Maurice H. Rosenfeld—1908—August—1942—Physical Examination & blood sugar Determination—report was normal"

The space provided in 44 for explanation or "Special Information" is so small [I. 44] as to indicate that no complete 5 year medical and diagnostic history is contemplated. Furthermore, the above quoted "Special Information" at 44, as written by the medical examiner, bears the interpre-

tation (by reason of the unintelligibility, uncertainty and ambiguity of the phrase "1908 August 1942"): that the "insured" had consulted and been examined by Dr. Rosenfeld over the period of from 1908 to August 1942, and not merely on one occasion in August, 1942, as it is construed in finding XI [I, 52-53].

The Appellee was well aware of the fact that its "Part II" and particularly question 36 "B" therein, did *not* request the "insured" to furnish, and that he had not furnished, as "Special Information" under 44, *all* "reasons" for, or *all* "details" of, the insured's consultation with or examination by Dr. Rosenfeld. This is demonstrated by Appellee's letter [II, 432] in explanation of telegram [II, 427] dated Dec. 1, 1942, advising that the issuance of the policy in suit was approved but that Appellee was unable to consider two additional policies requested aggregating an *additional* \$13,000 on the life of the "insured" "without a complete detailed statement from Dr. Rosenfeld *and Dr. Lisner*" (emphasis added), and that Appellee would like, to further quote Appellee's said letter, "*full details*" (emphasis added) as to:

- (a) "Why were the doctors consulted?"
- (b) "What were the symptoms?"
- (c) "What were the findings?"
- (d) "What treatment or advice was given?"
- (e) "What were the results?" [II, 432.]

Obviously Appellee was not only "on notice" but also "on inquiry". Nevertheless, Appellee claims that it was misled by, and there was fraud in, the "insured's" "No" answer to 4 interrogatories in 35, relative to:

- "A Indigestion?"
- "E Dizziness or fainting spells?"
- "F Palpitation of heart?"
- "H Pain or pressure in the chest?"

Appellee was not misled by any of the “No” answers to any of the above mentioned 4 interrogatories in 35. The only one of those “No” answers which could possibly be considered incorrect is the one in response to subdivision “E” with reference to

“Dizziness or fainting spells?”

This question in “Part II” appears immediately below the inquiry with reference to “Insomnia?” [II, 406] which the medical examiner clearly misinterpreted and erroneously propounded to the “insured” by *failing to ask* the “insured” if he had “ever” suffered from insomnia, as the printed question technically appears, and actually the medical examiner asked the “insured”:

“Do you sleep well?” [I, 213].

The “insured” answered “yes” [I, 213] and the medical examiner, on the witness stand in open court still obtuse to the significance of the printed question, interpreted the answer of the “insured” as follows:

“That answer would be ‘No’ for insomnia” [I, 213].

While the medical examiner claims to have asked the “insured” whether he ever suffered from dizziness or fainting spells, it is obvious from the medical examiner’s treatment of the inquiry with reference to insomnia (which in 35 of Part II appears immediately before and above), that the question probably and undoubtedly propounded to the “insured” in this connection was:

“Do you suffer from dizziness or fainting spells?”

meaning do you *now* or *currently* suffer from dizziness or fainting spells?

While it is true that on January 15, 1937 [I, 155], *over* 5 years prior to (November 16, 1942) the date on which

said "Part II" was signed by the "insured", he did complain of dizziness to the eye specialist, Dr. Seech [I, 156], and the next day with respect to the same complaint consulted Dr. Rosenfeld [I, 102], on May 21, 1938, the findings of Dr. Seech with respect to the same complaint were negative [I, 162]. That is all the evidence with respect to dizziness except that there is no evidence that the "insured" ever complained of dizziness again and there is substantial affirmative evidence that he *never again so complained* [I, 118, 137, 140].

"A. Indigestion?"

There is not any evidence in the record that the "insured" *ever* suffered from "indigestion". Dr. Rosenfeld explained [I, 126] that the so called "gas" pains with which the insured suffered were due to the heart; "the stomach is not the thing at fault".

"F. Palpitation of the heart?"

While the "insured" complained of heart pains, he *never* complained of "palpitation of the heart" and Dr. Rosenfeld's only diagnosis in this connection was "probably" angina pectoris "probably" due to the coronary artery narrowing [I, 106]. There is no evidence that the "insured" *ever* suffered from palpitation of the heart. Finding IX [I, 52] is ambiguous as to this.

"H. Pain or pressure in the chest?"

The "heart" is to be distinguished from the "chest". The "insured" did complain of pain in the region of his heart which on June 1, 1942, he thought were "gas" pains [I, 136] until Dr. Rosenfeld on that day explained that the pains were in, and due to, the heart itself rather than "gas" and that a diagnosis of angina pectoris was "sus-

pected" [I, 107]. Thereafter the pains disappeared [I, 107, 118, 137, 115, 140] which the doctor attributed to the "insured's" restriction of activity rather than to the nitroglycerine [I, 137] which is also prescribed for high blood pressure [I, 135].

Unless the terms "heart" and "chest" are synonymous and interchangeable, the "insured" *never* had any pain in the chest and certainly he had no condition diagnosed as "pressure" in the chest.

In *Lyon v. United Moderns*, 148 Cal. 470, the Supreme Court said in this connection:

"It must be recognized that the rule applicable in the construction of insurance contracts of construing the contract in favor of the assured and against the insurer, where it is reasonably susceptible of such construction, is applicable in such cases, '*where an insurance company or association seeks to avoid a policy or certificate of membership on the ground of falsity in an answer to a question which is by the terms of the contract made material, the court will construe the question and answer strictly as against the company, and liberally with reference to the insured,*' and, '*if any construction can reasonably be put on the question and the answer such as will avoid a forfeiture of the policy on the ground of falsity of the answer, that construction will be given, and the policy will be sustained.*' (Newton v. Southwestern Mut. Life Assn., 116 Iowa, 311, (90 N. W. 73)." (Italics supplied.)

Furthermore, if the medical examiner asked the "insured": "Do you have", rather than "Have you ever suffered from", pain or pressure in the chest, as the medical examiner undeniably and erroneously did with respect to the inquiry regarding "insomnia", it is obvious that the answer of the "insured" was correct. Cooley's Briefs on

the Law of Insurance (Vol. 3, p. 2594) is quoted with approval in *Lyon v. United Moderns, supra*, as follows:

“From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, *or merely the medical examiner for the company*, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy.” (Emphasis added.)

While the pharmacist, H. C. Ludden, on March 23, 1945 [I, 79], testified, over Appellant's objection [I, 84], that the “insured” on June 1, 1942 [I, 84] “remarked that he did have a pain in his chest” [I, 88], nevertheless, the witness corroborated Dr. Rosenfeld's testimony that the pain was in the *heart*, rather than in the chest, of which fact the “insured” was again so advised and admonished by the directions which the witness Ludden said he placed on the bottle [I, 94, 95], to wit:

“Dissolve one tablet under tongue for *heart* pain.”
(Emphasis added.)

As stated in the case of *Turner v. Redwood Mutual Life Ass'n*, 13 Cal. App. (2d) 575, at 578:

“* * * Under such circumstances defendant should not be permitted to come into court after death had sealed the insured's lips and prevented her from explaining, if she could, why she did not mention an

operation in 1926, when she did mention an illness and treatment by physicians which, we conclude from the evidence and proffer of proof, occurred at the same time as the operation. The illness and some treatment, though not the correct organ involved, were disclosed, and only the fact of an operation to effect a cure was withheld. As defendant made no investigation when it should and could have, and as it issued its policy of insurance, accepted Mrs. Turner's money for six years and lulled her into the secure belief that she had a valid policy of life insurance, it must be held that it waived the misstatement in the application and is now estopped from asserting the purported fraud." (Emphasis added.)

- (i) **Appellee Has Not Sustained the Burden of Proof, and There Is No Competent Evidence, With Respect to Any Unfavorable State of the Insured's Health When the Application Was Approved or When the First Premium Was Paid or When the Policy Was Delivered.**

The application was approved November 27, 1942 [I, 255]. The policy was delivered and the first premium was paid on or about some date between December 7th and 9th, 1942 [I, 384].

Between August 11, 1942 and April 7, 1944, Dr. Rosenfeld did not see or prescribe any medicine for the insured [I, 143-144]. The trial court limited Dr. Rosenfeld's testimony to the information obtained by him *prior* to November 16, 1942 [I, 355].

The Appellee's medical examiner has been a practicing physician since 1910 [I, 199], has practiced or been admitted to practice in California since 1917 [I, 199] and has specialized in physical examinations of persons who apply for insurance since 1927 [I, 199].

On November 16, 1942 [I, 201], after giving the “insured” a physical examination [I, 207, 221] and having in mind the fact that the insured was 64 years of age [I, 212], it was the opinion of the medical examiner that the insured was in *good health* [I, 212], a *normal state of health* [I, 211], and an *insurable risk* [I, 219].

The insured died of an acute attack of coronary thrombosis [I, 119]. He was sent to the hospital for an acute ulcer of the stomach [I, 120]. It is possible for a person to have mild angina pectoris and thereafter effect a complete recovery and many times a person will have all the symptoms of mild angina and over a period of time and treatment can completely recover [I, 149]. Normal healthy appearing people suffer from fatal attacks of coronary thrombosis without any previous symptoms [I, 143]. On August 11, 1942 [I, 144], when Dr. Rosenfeld last saw the insured before the latter signed “Part II” on November 16, 1942 [II, 406], the insured had no complaints [I, 118] and although the doctor testified his “suspicion” was the same [I, 118], nevertheless, the insured was improving and was better [I, 141]. His blood pressure [I, 144] and blood sugar were normal [I, 145]. He was recovered from the pain [I, 150]. The appearance of the insured was that of a normal appearing man in every way [I, 144].

There is no competent evidence that the insured was not in good health at all times between November 16, 1942 when “Part II” was signed to and including December 9, 1942, when the policy was delivered and the premium was paid [II, 384].

Summary.

The Appellant was guilty of no fraud, misrepresentation or concealment, and the “insured” was innocent thereof. Question 36 A in “Part II” asked whether the “insured” had consulted or been examined by “a physician” within 5 years; not how many, as Appellee claims and is implied in the trial court’s Finding XI.

Appellee’s medical director [I, 247], Harold M. Frost, M. D. [I, 246], who approved [I, 255] the application, testified that he knew that the insured had consulted a doctor other than the one mentioned by the “insured” in “Part II” [I, 295]. This knowledge, and information that the “insured” had been previously rejected for insurance on account of sugar in his urine [I, 216], had a history of diabetes [I, 216], had recently lost weight [II, 406] and had consulted Dr. Maurice H. Rosenfeld [II, 406], who gave the “insured” a general physical examination, checked his heart and listened to his chest [I, 218], put Appellee on notice and it was on inquiry [II, 432] of its general agents [I, 271] in Los Angeles to secure the information from Dr. Rosenfeld which it now claims was withheld from, and misrepresented to, it.

Simultaneously with its inquiry [II, 432] of its general agents to get in touch with Dr. Rosenfeld and without waiting for any reply thereto, Appellee consciously took a chance, because the risk was with reference to an amount less than \$15,000.00, and issued the policy in suit knowing the insured had not mentioned Dr. Lisner or furnished Appellee with “full details” as to “why” he consulted the

doctors, "what" the symptoms, findings or results were, or what treatment or advice was given [II, 432].

By furnishing Appellee with Dr. Rosenfeld's name and address and executing the waiver of privilege and authorization for full disclosure, the insured placed at Appellee's disposal the "exact source" of information from which Appellee could have obtained full and complete information on everything it now claims was withheld from, and misrepresented to, it.

It is with poor grace that Appellee, after the death of the insured and the loss has occurred, inequitably, illogically and illegally, in its effort to avoid liability, urges, *in its own complaint*, that the insurance contract is void, and at the same time seeks, and is allowed, to stand on the insured's waiver of privilege and express authorization for full disclosure, a provision expressly made a part of the contract, then being repudiated as void, by Appellee. Cases cited show the law does not sanction or permit such inconsistency. "The insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit."

Even if Appellee's position with respect to the insured's waiver of privilege and express authorization for full disclosure were tenable, and under the law it is not, nevertheless, statements and complaints of the *deceased* made *prior* to the date of the application, to his attending physician or anybody else were hearsay as to Appellant. This would apply to all subjective symptoms on which diagnoses were based. Such evidence was clearly hearsay and erroneously admitted over Appellant's timely objections.

There is no evidence in the record with respect to any unfavorable state of the insured's health when the application was approved, the policy was delivered and the first

premium thereon was paid. Appellee's own medical examiner gave the insured a complete physical examination on November 16, 1942, in connection with the insured's execution of "Part II" and, having in mind the fact that the insured was 64 years of age, it was the opinion of said medical examiner that the insured was then in a normal state of good health and an insurable risk.

Conclusion.

It is respectfully submitted, therefore, that the trial court committed errors of law in

1. Denying Appellant's motion to dismiss;
2. Admitting, over Appellant's objection, testimony of insured's attending physicians with respect to the health and physical condition of the insured;
3. Admitting, over Appellant's objection, testimony of witnesses with respect to statements made by the "insured" prior to the date of the application for the policy in suit, which said statements were not part of the *res gestae*;
4. Failing to find that Appellee had waived its right to complain of concealment or fraud alleged or to claim that the insured was not in good health when the application was approved, the policy was delivered and the first premium thereon was paid;
5. Failing to find that Appellee was estopped to deny liability on the ground of fraud or concealment alleged, or to claim the insured was not in good health when the application was approved, the policy was delivered and the first premium thereon was paid;
6. Decreeing rescission and cancellation of the policy for alleged misrepresentation and concealment attributed to the then deceased insured with respect to his health and medical history.

It is respectfully further submitted that there is no competent evidence to sustain the trial court's findings of fact and conclusions of law, to which exception is taken in the specification of errors numbers (5) and (6) respectively, *supra*;

There was no fraud, misrepresentation or concealment. Even if there were, and Appellant makes no such concession, Appellee waived its right to complain, and is estopped to deny liability by reason, thereof inasmuch as it was on notice and inquiry but elected to make and made no investigation, and consciously took a chance because the risk was small in its opinion although the exact source of the information, which it claims was withheld from and misrepresented to it, was made available to Appellee at the time "Part II" was signed by the insured.

The insured's statements to his physicians made prior to his execution of "Part II" were privileged and inadmissible in evidence under the insured's waiver of privilege in the policy, which made the waiver a part of the insurance contract if the contract was void as Appellee claimed and in its complaint alleged. Such statements were also hearsay as to Appellant.

Respectfully submitted,

McLAUGHLIN, MCGINLEY & HANSON,
Attorneys for Appellant.

WILLIAM L. BAUGH,
Of Counsel.



APPENDIX.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON APPEAL UNDER RULE 19(6).

Notice Is Hereby Given that at the hearing of this appeal, appellants will rely upon the following points:

Point I.

The trial court erred in denying defendants' motion for dismissal at close of plaintiff's case. This error resulted primarily from (a) failure properly to apply the law of contracts which prevents a party from claiming and enjoying the benefits of a contract at the same time while urging the contract to have been void from its inception. The plaintiff had denied liability under the policy of insurance in suit, yet was permitted to claim the benefits of a waiver of confidential communications signed by insured on the application which was made a part of the policy by incorporation; and (b) failure to decree that plaintiff had [74] waived and was estopped to claim that material information had been withheld from it relative to insured's physical condition and medical history.

Point II.

The trial court erred in admitting, over objection of the defendants, testimony of insured's attending physician disclosing information relating to the health and physical condition of the insured during his lifetime. Such information was acquired from insured to enable said attending physician to prescribe treatment. This error was contributed to by the court's failure to rule that (a) a phy-

sician may not, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient; (b) plaintiff insurance company was prohibited and estopped from claiming and enjoying the benefits of the waiver which, by the terms of the policy, was expressly made a part of the contract, when it affirmatively appeared by the pleadings and proof that plaintiff insurance company denied all liability under said policy and claimed that said contract was void from its inception; and (c) certain limited and special waivers signed by the beneficiary under the policy, after the insured's death, did not constitute general waivers of privileged communications relating to the insured's health and medical history.

Point III.

The trial court erred in decreeing rescission and cancellation of the policy in suit for fraud of insured in allegedly concealing and misrepresenting material facts relative to the insured's health and medical history. This error resulted from a failure properly to apply the law of waiver and estoppel against plaintiff insurance company under the special facts shown by the evidence.

Point IV.

The trial court erred in failing to decree that plaintiff [75] had waived the alleged fraud complained of. This error resulted from an improper interpretation and application of the law relating to the defense of waiver in view of the evidence showing that (a) plaintiff insurance com-

pany had placed at its disposal, prior to the issuance of the policy in suit, the exact source from which it could have obtained the information upon which the court decreed rescission and cancellation; (b) plaintiff insurance company was furnished with a waiver of confidential communications, the name of insured's attending physician, the fact of a physical examination shortly prior to the date of the application, yet made no investigation or an incomplete investigation, promptly issued its policy and accepted without protest two annual premiums; and (c) plaintiff insurance company remained silent during the lifetime of insured, and following the death of insured and filing of notice of claim and proof of death, for the first time, by investigation disclosed facts concerning insured's health and medical history, which could have been ascertained by it prior to the issuance of the policy, or, in any event, during the lifetime of insured, by contacting insured's attending physician.

Point V.

The trial court erred in failing to find that plaintiff was estopped from asserting the alleged fraud complained of. The error resulted from an improper interpretation and application of the law relating to the defense of estoppel under the circumstances set forth under Point IV. Additionally, (a) the defendant Harry Lutz had caused to be cancelled, to his prejudice, other insurance policies on the life of the insured, in the belief that the policy in suit was valid; and (b) no attempt was made by plaintiff insurance company to cancel or rescind the policy in suit until after the death of the insured and subsequent to the

time defendant Harry Lutz had materially changed his position [76] by accepting lesser benefits from paid-up policies on the life of insured.

Dated: September 7, 1945.

McLAUGHLIN & MCGINLEY,

JOHN P. MCGINLEY

W. L. BAUGH

Attorneys for Appellants Harry Lutz and
Harry Lutz and Rose Lutz as Executor
and Executrix of the Last Will and
Testament of Abe Lutz, Deceased.

Address: 1224 Bank of America Building
650 South Spring Street
Los Angeles 14, California

Received copy of the within document this 7th day of
Sept. 1945. Meserve, Mumper & Hughes, by Berta Diet-
rich, Attorneys.

[Endorsed]: Filed Sep. 7, 1945. [77]

No. 11180

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ, as
executor and executrix of the last will and testament
of Abe Lutz, deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF
BOSTON, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

MESERVE, MUMPER & HUGHES,
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Attorneys for Appellee.

FILED

MAR 28 1946

AUL P. O'BRIEN

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of Abe Lutz, deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF
BOSTON, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

This action was brought by appellee, a life insurance company, to rescind and cancel a certain policy of life insurance insuring the life of one Abe Lutz, hereinafter referred to as the "insured" [R. 2 to 21]. Appellee's amended complaint alleged in substance that matters of fact relating to the health and medical history of the insured, and material to the risk insured against, were misrepresented and concealed in the application for said policy [R. 6 *et seq.*]. It was further alleged in the amended complaint that the insured was not in good

health, either at the time said application was approved by appellee or at the time the first premium was paid by appellant, and that, by reason of said fact, the policy, according to its terms, never became effective [R. 14, 15].

After a trial on the merits, the court below made findings of fact sustaining all the material allegations of appellee's amended complaint [R. 49 to 61]. The court further found, contrary to the contentions of appellant, that appellee had not waived, and was not estopped to assert, its right to rescind and cancel the policy [R. 56 to 59].

Upon these findings, the trial court concluded that appellee was justified in rescinding and cancelling the policy and, further, that, by reason of the fact that the insured was not in good health when the application for the policy was approved and when the first premium thereon was paid, the policy, by its terms, failed to become effective [R. 60, 61]. Judgment was accordingly rendered, declaring the rescission and cancellation of the policy and denying appellant any recovery thereon [R. 62, 63]. Reference to the record discloses the abundant sufficiency of the evidence to sustain the findings of the District Court.

On November 14, 1942, Abe Lutz, as "Proposed Insured," and appellant Harry Lutz, as "Applicant for Insurance," signed Part I of an application to appellee for the issuance of a policy of ordinary life insurance in the amount of \$13,000.00 upon the life of said Abe Lutz, said insurance to be payable to appellant, whose relationship to the insured was stated to be that of a son. Part I of the application is designed to elicit information as to the place of residence, age and occupation of the proposed insured, the amount and form of insurance applied for,

the name of the proposed beneficiary, etc. Part I of the application contains the following provision:

“It is Hereby Agreed that this Application, including Part II, a copy of which shall be attached to the Policy when Issued, shall become a part of every Policy issued hereon; that acceptance of a Policy shall constitute ratification of any and all changes noted by the Company under ‘Additions and Amendments,’ and that the insurance applied for shall not take effect unless and until this Application is approved by the Company at its Home Office and the first premium is paid while the Proposed Insured is in good health; provided that subsequent premiums shall be due and subsequent policy years begin as shown on the first page of the Policy. If, however, the first premium is paid with this Application, and it is so stated in answer to Question 24, the insurance shall take effect as stipulated in the Conditional Receipt.” [R. 392.]

On November 16, 1942, the insured submitted to a physical examination by appellee’s medical examiner, and then and there signed Part II of the application for said policy, which sets forth the questions propounded by the medical examiner concerning the health and medical history of the proposed insured and the answers of the latter in response to said questions [R. 393]. The following questions and answers, among others, appear:

“29. What illnesses, diseases or injuries have you had since childhood? Describe fully.

<i>Name of disease</i>	<i>Date of attack</i>	<i>Duration</i>	<i>Severity</i>	<i>Results</i>
<i>Influenza</i>	<i>1918</i>	<i>2 weeks</i>	<i>Mild</i>	<i>Good</i>
<i>Slight colds</i>				
<i>occasionally</i>	<i>None for 1 year</i>		<i>Mild</i>	<i>Good</i>
*	*	*	*	*

35. Have you ever suffered from: (Give details under 44)
- A. Indigestion? *No.*
 - B. Insomnia? *No.*
 - C. Nervous strain or depression? *No.*
 - D. Overwork? *No.*
 - E. Dizziness or fainting spells? *No.*
 - F. Palpitation of heart? *No.*
 - G. Shortness of breath? *No.*
 - H. Pain or pressure in the chest? *No.*
36. A. Have you consulted, or been examined by, a physician or other practitioner within five years? *Yes.*
- B. If so, give reasons, name of practitioner and details under 44.

* * * * *

44. SPECIAL INFORMATION:

36. *Dr. Maurice H. Rosenfeld, 1908, August 1942, Physical examination and blood sugar determination—report was normal.*
30. *Tonsils were slightly enlarged previous to tonsilectomy—1930—good results."*

It will be observed that the insured, by his answers to the questions contained in the application, specifically denied that he had ever suffered from indigestion, nervous strain or depression, dizziness or fainting spells, palpitation of the heart, shortness of breath or pain or pressure in the chest. Question number 36 inquired whether insured had consulted, or been examined by, a physician within five years, and, if so, required the giving of reasons, name of practitioner and details. In response to this question, the insured disclosed that he had consulted

Dr. Maurice H. Rosenfeld in August, 1942, for physical examination and blood sugar determination, stating that "report was normal."

Below the above stated questions and answers, and immediately above the signature of the proposed insured, the following statement appears:

"I certify that I have read my answers to the foregoing questions, that they are true and complete, and that they are correctly recorded. I expressly waive to such extent as may be lawful, on behalf of myself and of any other person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired, and I authorize any such disclosure." [R. 393.]

On December 1, 1942, appellee issued the policy in suit in the amount of \$13,000.00 [R. 39 to 46]. Said policy recites on its face that it is issued "in consideration of the application" and of the annual premium therein provided to be paid. The policy contains, among others, the following provision under the sub-title "CONTRACT":

"This Policy and the application, a copy of which is attached to and made a part of this policy, constitute the entire contract between the parties. All statements made by the Insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties; and no such statement shall be used in defense to a claim unless contained in the application and unless a copy of such application is attached to this Policy when issued. No endorsement or alteration of this Policy and no waiver of

any of its provisions shall be valid unless made in writing by the Company and signed by its President, Vice-President, Secretary, Assistant Secretary or Registrar; and no other person shall have authority to bind the Company in any manner." [R. 41.]

A photostatic copy of the application was attached to the original of the policy [R. 44]. The policy was delivered to appellant Harry Lutz at Los Angeles, California, on or about December 9, 1942, at which time the first annual premium was paid [R. 384].

The insured died on May 28, 1944, that is, approximately seventeen months after the date of the issuance of the policy. In the death certificate filed with the Bureau of Vital Statistics, the causes of death were stated to be acute coronary thrombosis, angina pectoris and duodenal ulcer [R. 420].

Subsequent to receipt of the proofs of death, appellee instituted an investigation which lead to the discovery that material facts concerning the medical history and state of health of the insured had been concealed and misrepresented in the application [R. 297].

One of the witnesses called by appellee at the trial was Stephen G. Seech, a physician and surgeon specializing in ophthalmology. This physician testified that he was consulted by the insured on January 15, 1937 [R. 155], at which time the insured informed the doctor that he had been suffering from dizziness and nausea [R. 156]. The doctor testified that he examined the insured's eyes with an ophthalmoscope and found "several very tortuous vessels * * * and a few punctuate hemorrhages" [R. 156]. The doctor testified that the hemorrhages could indicate several conditions, including diabetes, per-

nicious anemia and arteriosclerosis [R. 160]. At the time of the first consultation, Dr. Seech gave the insured a prescription for phenobarbital tablets, the purpose of which was "to quiet the apprehension of the patient" [R. 162].

At the time of a second consultation in October, 1937, Dr. Seech gave the insured a prescription for saturate solution of potassium iodine, the purpose of which was "to hasten the absorption of blood" [R. 163]. On the occasion of a third consultation with Dr. Seech on May 21, 1938, the insured again complained of dizziness [R. 161].

Appellee also called as a witness Dr. Maurice H. Rosenfeld, a physician specializing in diseases of the heart [R. 98]. Dr. Rosenfeld testified that he was first consulted by the insured on January 16, 1937, the patient having been referred to him by a Dr. Polesky [R. 101].

On the occasion of the first consultation, the insured complained to Dr. Rosenfeld "of dizziness and inability to arise the week before the examination of January 16, 1937" [R. 102]. The doctor made a complete physical examination and laboratory study, and took an electrocardiograph. Dr. Rosenfeld testified that he thereupon made a diagnosis of "probable slight stroke," and that he found evidence of arteriosclerosis, or hardening of the arteries, a disease which he stated was "progressive and chronic" [R. 103]. Dr. Rosenfeld further testified:

"I advised the patient that he had a mild stroke, in that he had symptoms which were suggestive and that, together with the report by an eye specialist who I had seen, suggested this condition, and for that reason I advised him of this possible diagnosis." [R. 104.]

The insured again consulted Dr. Rosenfeld on June 1, 1942, complaining that on excitement, strain or effort, he was subject to pain in the heart region [R. 104]. After the consultation of June 1, 1942, and after studying the electrocardiograph taken on that date, Dr. Rosenfeld made a diagnosis of probable angina pectoris, due to narrowing of the coronary artery. Dr. Rosenfeld advised the insured to curtail his activities, and gave him a prescription of nitroglycerine tablets for relief of the pain of angina pectoris, which the doctor described as an acute pain referable to the heart region [R. 106].

The insured went to the office of Dr. Rosenfeld for further examinations and for the taking of electrocardiographs on June 3, June 5, June 12, July 6, August 7 and August 11 of 1942. On each of these several occasions, the doctor told the insured "that in view of the fact that he was subject to pain around his heart that occurs after exercise or effort or after emotion, together with the minor changes noted in the electrocardiogram, that it was my opinion that these were due to a condition known as angina pectoris" [R. 117].

Dr. Rosenfeld testified that angina pectoris, caused by the narrowing of the coronary artery, was "a chronic disease manifested by an acute exacerbation of pain" [R. 119]; that "the condition that was the actual cause of death was just a continuation of the process of angina pectoris" [R. 121]; and that the insured was suffering from arteriosclerosis and angina pectoris during the period from June 1, 1942, to December 9, 1942 [R. 120 to 123].

Appellee called as a witness one H. C. Ludden, a pharmacist, who testified that he had known Mr. Lutz, the insured, for some twenty years [R. 81]; and that on

June 1, 1942, the witness, at the request of the insured, filled a certain prescription for nitroglycerine tablets [R. 83]. This prescription, which had been given the insured by Dr. Rosenfeld, is in evidence as Plaintiff's Exhibit No. 7 [R. 401]. The direction written on the prescription is as follows: "Sig.—Dissolve one tablet under tongue for heart pain." With reference to his discussion with the insured on June 1, 1942, Mr. Ludden testified further as follows:

"Q. On that occasion, Mr. Ludden, did Mr. Lutz express to you anything to the effect that he was suffering from any pain or illness? A. Mr. Lutz came in and simply handed me the prescription, and made the remark that he did have a pain in his chest, and would like to have the prescription as soon as possible.

Q. Did you have occasion to refill the prescription for nitroglycerine, which has been identified as Plaintiff's Exhibit No. 7 for identification? A. Many times.

Q. How many times would you estimate, Mr. Ludden, did you refill the prescription which is Plaintiff's Exhibit No. 7 for identification, between June 1, 1942, and October 31, 1942, if you can estimate it? A. That would be pretty hard to state.

Q. Would you say as much as twice? A. I would say about four times." [R. 88.]

* * * * *

"Q. Please read to us the part or parts, if any, on that exhibit, which is Plaintiff's Exhibit No. 7, which you placed on the bottle. A. The words: Prescription No. 89543. Dr. M. H. Rosenfeld. Dissolve one tablet under tongue for heart pain. Mr. Lutz. 6-1-42.

Q. Do I understand that that portion of the exhibit which you have just read was placed by you on the label of the bottle? A. Yes, sir." [R. 94.]

The foregoing summary of the evidence suffices to demonstrate the substantial foundation upon which the findings of the District Court are based. These findings include the following:

"That in and by said application for said policy of insurance, said Abe Lutz, insured, represented to plaintiff company that said Abe Lutz had never suffered from indigestion, dizziness or fainting spells, palpitation of the heart or pain or pressure in the chest. That said representations were false and were known by said insured to be false at the time said application was made and signed; that prior to the time that said application for insurance was made and signed, said insured had suffered from indigestion, dizziness and fainting spells and from pain in the chest." [Finding No. IX, R. 52.]

"That in and by said application for insurance, the insured was asked whether he had consulted or been examined by a physician or other practitioner within five years prior to the date thereof, and, if so, to give reasons, name of practitioner and details with reference thereto. That in response to said questions, the insured disclosed no information except that he had consulted Dr. Maurice H. Rosenfeld in August, 1942, and was given at that time a physical examination and blood sugar determination; and insured represented that the report of said examination was normal." [Finding No. X, R. 52.]

"That, within five years prior to the date of said application, said insured had consulted, and had been examined by, physicians at times other than in

August, 1942; that within five years prior to the date of said application for insurance, said insured had consulted and been treated by physicians for dizziness and fainting spells and for pain in the chest. That during the year 1942 and prior to the date of the application for said insurance, said insured, on numerous occasions, had consulted and been examined by a physician and had received treatments for angina pectoris, a disease of the heart. That during the year 1942 and prior to the date of the application for said policy of insurance, said insured had submitted to repeated physical examinations which included the taking of electrocardiograms and had been told by his physician that he was suffering from a heart ailment, to-wit, angina pectoris, and that he should curtail and limit his activities by reason thereof; that during the year 1942 and prior to the date of the application for said policy of insurance, said insured's physician had prescribed medicine to relieve pain in the chest suffered by insured as a result of said heart ailment. That all of the facts in this paragraph recited were concealed, and none of them was disclosed, in the application for said policy of insurance." [Finding No. XI, R. 52, 53.]

"That all of the facts concerning the health and medical history of said insured which were misrepresented and concealed in the application for said policy of insurance, as herein found, were known to the insured at the time said application was made and signed, and said facts were material to the risk insured against under the terms of said policy." [Finding No. XII, R. 53.]

"That it was, and is, provided by the terms of said policy of life insurance and of the application therefor that said policy should not take effect unless and

until said application should be approved by plaintiff at its home office and the first premium paid while the said insured was in good health. That said insured was not in good health at the time said policy was delivered, or at the time the first premium thereon was paid. That said insured knew, at the time said application for insurance was signed and delivered and at the time said policy was issued and delivered, and at the time the first premium thereon was paid, that he was not in good health, but that he was suffering from a serious disease of the heart, to-wit, angina pectoris." [Finding No. XIX, R. 56.]

POINT I.

Concealment or Misrepresentation of a Material Fact in an Application for Insurance Entitles the Insurer to Rescind, Regardless of Whether the Concealment or Misrepresentation Was Intentional or Unintentional.

The policy in suit was applied for and delivered, and the premiums thereon were paid, in California. It is therefore a California contract, so that the substantive law of California is applicable and controlling.

Equitable Life Assurance Society v. Pettus, 140 U. S. 226, 11 S. Ct. 822; 35 L. Ed. 497;

Gates v. General Casualty Co. of America, 120 F. (2d) 925, 926;

Palmquist v. Standard Accident Ins. Co., 3 F. Supp. 356, 357.

The California law is well settled that a false representation, or the concealment of a material fact, in an application for a policy of insurance, *whether intentional or unintentional*, vitiates the policy. Fraudulent intent is

not an essential element of a cause of action for rescission of an insurance contract.

Gates v. General Casualty Co. of America, 120 F. (2d) 925, 926;

California Western States Life Ins. Co. v. Feinstein, 15 Cal. (2d) 413, 101 P. (2d) 696;

Telford v. New York Life Ins. Co., 9 Cal. (2d) 103, 69 P. (2d) 835;

Maggini v. West Coast Life Ins. Co., 136 Cal. App. 472, 29 P. (2d) 263.

In *Telford v. New York Life Ins. Co.*, *supra*, the Supreme Court of California said:

“A false representation or a concealment of fact, whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential.”

In *Gates v. General Casualty Co. of America*, 120 F. (2d) 925, at page 927, this court stated and applied the same rule, quoting with approval from the decision in *Telford v. New York Life Ins. Co.*, *supra*.

The California Insurance Code, in the article headed “CONCEALMENT,” contains the following provisions:

“§330. Definition. Neglect to communicate that which a party knows, and ought to communicate, is concealment.

“§331. Effect. Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.”

The same code, in the article headed "REPRESENTATION," contains the following provisions:

"§358. Falsity. A representation is false when the facts fail to correspond with its assertions or stipulations.

"§359. Effect of falsity. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false."

Appellant argues (1) that the insured was not a party to the insurance contract, (2) that the only contracting parties were appellee, as insurer, and appellant, as beneficiary and owner of the policy, and (3) that the policy does not provide, either expressly or by implication, that appellant's rights under the contract are dependent upon, or affected by, the conduct of the insured or the truth or falsity of the statements of the insured as contained in the application. Upon these premises, appellant predicates his argument that the contract in suit is not vitiated by any concealment or misrepresentation of facts in the application for the policy.

Appellee submits that appellant's argument is fallacious both in its premises and in its conclusion.

Part I of the application for the policy involved in this case was signed by appellant as "*Applicant for Insurance*," and by Abe Lutz as "*Proposed Insured*" [R. 405]. Immediately above the signatures of appellant and the insured, the following language appears upon Part I of the application:

"It is Hereby Agreed that this Application, including Part II, a copy of which shall be attached to the

*Policy when issued, shall become a part of every Policy issued hereon; * * *.*"

Under the heading "CONTRACT," the policy provides as follows:

*"This Policy and the application, a copy of which is attached to and made a part of this Policy, constitute the entire contract between the parties. All statements made by the Insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties; and no such statement shall be used in defense to a claim unless contained in the application and unless a copy of such application is attached to this Policy when issued. * * *" [R. 41.]*

Moreover, on its first page, the policy recites that *"This Policy is issued in consideration of the application and of the annual premium * * *."* [R. 39.]

By the plainest of language, the parties to the contract agreed that the application, including both Parts I and II, would be and become a part of the policy, and that *"all statements made by the Insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties."*

Appellant may deny the existence of a fraudulent intent on his part, but he cannot be heard to deny that the statements of the insured, as contained in the application, constituted representations. By the plain terms of the contract, appellant *adopted* as his own the statements of the insured, as set forth in the application, and agreed that they should be made a part of the contract. He further agreed that the statements of the insured should be deemed *representations*, or in the presence of fraud, *warranties*.

It is immaterial whether appellant or the insured *intended* to deceive or defraud the insurance company. It is sufficient to vitiate the policy if it be proved that a false or erroneous representation was made, either intentionally or unintentionally, as to any material fact (*Telford v. New York Life Ins. Co., supra*). The California statute plainly states that “*a representation is false when the facts fail to correspond with its assertions or stipulations.*” (*California Insurance Code, Sec. 358.*)

Clearly, the well supported findings of the District Court that matters of fact, material to the risk, were misrepresented and concealed in the application suffice to sustain the judgment under review.

POINT II.

Answers to Written Questions Set Forth in an Application for Insurance Constitute Material Representations as a Matter of Law.

The California law is well settled that answers to written questions set forth in application forms relative to insurance contracts are *deemed* material as a matter of law.

California Western States etc. v. Feinstein, 15 Cal. (2d) 413, 101 P. (2d) 696;

Pierre v. Metropolitan Life Ins. Co., 22 Cal. App. (2d) 346, 70 P. (2d) 985;

Inversion v. Metropolitan Life Ins. Co., 151 Cal. App. 746, 91 Pac. 609;

Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734, 151 Pac. 159;

McEwen v. New York Life Ins. Co., 42 Cal. App. 133, 146, 183 Pac. 373;

Maggini v. West Coast Life Ins. Co., 136 Cal. App. 472, 29 P. (2d) 263;

Layton v. New York Life Ins. Co., 55 Cal. App. 202, 202 Pac. 958.

In *California Western States etc. Co. v. Feinstein, supra*, the California Supreme Court said:

“It has been held that answers to written questions set forth in application forms relative to insurance are generally *deemed* material representations.” (Citing many cases.)

In *Maggini v. West Coast Life Ins. Co., supra*, it was stated:

“The materiality of the representations cannot be doubted, these being in the form of written answers made to written questions which the parties themselves thus indicated they deemed material.”

In *Pierre v. Metropolitan Life Ins. Co., supra*, we find the following expressions:

“Answers to questions in an application are generally considered to be material representations of fact, which if false will vitiate the contract * * * an answer to a question as to whether an applicant had ever had a specified disease is material and, if false, avoids the policy * * *.”

The foregoing authorities clearly show that appellee's right to rescind was fully and completely established by proof that matters of fact relating to the health, physical condition and medical history of the insured were falsely represented in the application. In other words, the facts concealed and misrepresented by the insured in the instant case were, necessarily and as a matter of law, material.

POINT III.

The Policy in Suit Never Became Effective Because the Insured Was Not in Good Health When the Application for the Policy Was Approved and When the First Premium Thereon Was Paid.

As we have seen, the District Court found, upon substantial and uncontradicted evidence, that the insured was not in good health at the time the application for the policy in suit was approved or at the time when the first premium was paid, but was suffering from a serious disease of the heart, to-wit, angina pectoris. This finding was supported by evidence that prior to the date of the application, the insured had suffered a stroke, and by the testimony of Dr. Rosenfeld that during the period from June 1, 1942, to December 9, 1942, the insured was suffering from arteriosclerosis and angina pectoris, diseases which were immediately contributing causes of the insured's death. Under these circumstances, the following provision of the contract is of decisive effect:

“ * * that the insurance applied for shall not take effect unless and until this Application is approved by the Company at its Home office and the first premium is paid while the Proposed Insured is in good health; * * *.”*

Referring to an almost identical clause in deciding a case involving a factual situation strikingly similar to the case at bar, the Circuit Court of Appeals for the Eighth Circuit used the following language in *Gill v. Mutual Life Ins. Co. of N. Y.*, 63 F. (2d) 967, at page 970:

“ * * It is well settled that this clause in that contract, which provides that a policy shall not become effective unless delivered and received while the*

insured is in good health, is valid and will be enforced; * * *.”

The foregoing quotation is followed in the text by the citation of a long list of supporting decisions. (Accord, see 4 *Couch Cyclopedia of Insurance Law*, Sec. 860, p. 2828.)

The validity and effectiveness of similar provisions creating conditions precedent were sustained in:

Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895;

New York Life Ins. Co. v. Gist, 63 F. (2d) 732, 735;

Shaner v. West Coast Life Ins. Co., 73 F. (2d) 681, 685;

Greenbaum v. Columbian National Life Ins. Co., 62 F. (2d) 56;

Continental Illinois Natl. Bank & Trust Co. v. Columbian Natl. Life Ins. Co., 76 F. (2d) 733;

Hurt v. New York Life Ins. Co., 51 F. (2d) 936;

New York Life Ins. Co. v. Gay, 36 F. (2d) 634, 636, 48 F. (2d) 595;

Pierre v. Metropolitan Life Ins. Co., 22 Cal. App. (2d) 346, 70 P. (2d) 985;

Security Life Ins. Co. v. Booms, 31 Cal. App. 119, 159 Pac. 1000.

Whether the non-fulfillment of the condition precedent to the effectiveness of the policy be regarded as affording appellee an additional ground for rescission, or whether it be considered only as a defense to appellant's counterclaim seeking recovery on the contract, it is, in either aspect, independently sufficient to sustain the judgment under review.

POINT IV.

Answers to Questions Propounded to the Proposed Insured in an Application for Insurance Are Representations Upon Which the Insurer Is Entitled to Rely, and the Insurer Is Under No Duty to Make an Investigation to Determine the Truth of Such Answers.

Appellant here contends that since the application disclosed the name of a physician from whom appellee might have learned facts at variance with the representations of the application, appellee is estopped to rely upon such representations. In other words, appellant argues that appellee was under a duty to investigate and make inquiry in order to ascertain whether or not the statements of fact contained in the application were true.

A complete answer to appellant's arguments on this aspect of the case is to be found in the opinion of this court in *Gates v. General Casualty Co. of America*, 120 F. (2d) 925, which cites and quotes at length from the California decisions. It discusses and distinguishes the case of *Turner v. Redwood Mutual Life Assn.*, 13 Cal. App. (2d) 573, 57 P. (2d) 222, upon which appellant so strongly relies in the instant case.

The insufficiency of the matters relied upon by appellant to spell out waiver or estoppel is demonstrated by reference to the California decisions cited in *Gates v. General Casualty Co. of America*, *supra*, and particularly the following:

Telford v. New York Life Ins. Co., 9 Cal. (2d) 103, 69 P. (2d) 835;

Frederick v. Federal Life Ins. Co., 13 Cal. App. (2d) 585, 57 P. (2d) 235;

Maggini v. West Coast Life Ins. Co., 136 Cal. App. 472, 29 P. (2d) 263.

In each of the cases last cited, facts were known to the insurer, at the time it acted upon the application involved, which tended to indicate incorrectness or incompleteness of certain answers therein contained. In each case, it was held that the insurer was not estopped to rescind upon discovering the falsity of material representations upon which it was entitled to rely. The following language from *Frederick v. Federal Life Ins. Co.*, *supra*, is particularly applicable:

“* * * Even if it be considered that defendant upon receipt of the medical examiner’s report, had knowledge that, as regards the treatment by Dr. Woods, plaintiff had not fully answered the questions in the application, it does not follow that defendant cannot resist recovery on the policy on account of other and serious representations which defendant thereafter learned to be false. The application and report of the medical examiner were forwarded to company headquarters where the officials of defendant company decided whether they cared to issue the policy. It was their right to reject the application if upon the information before them they desired to do so. The fact that they might have overlooked or considered as inconsequential an incorrect or incomplete answer contained in the application does not prevent their defense against fraudulent statements, the falsity of which was discovered after the issuance of the policy. The defendant had no knowledge at the time the policy was issued of the misrepresentations now relied upon to defeat recovery.”

In *Maggini v. West Coast Life Ins. Co.*, 136 Cal. App. 472, 29 P. (2d) 263, the court stated:

“But the evidence is clear that the appellant did not have any knowledge of the falsity of any of these misrepresentations except that relating to the illness of the insured five years prior to the date of the policies. This may have been sufficient to raise a suspicion as to the truth of other representations relied on; but cause for suspicion does not constitute knowledge. Hence there could be no estoppel of the insurer’s right to ‘set up the fraud by way of defense to an action brought to enforce the apparent liability.’ (*California Reclamation Co. v. New Zealand Ins. Co.*, 23 Cal. App. 611, 615 (138 Pac. 960, 961); *General Accident, Fire & Life Assur. Corp. v. Industrial Acc. Com.*, 196 Cal. 179, 189, 190 (237 Pac. 33).)”

It is the well settled rule in California that the mere fact that a defrauded party may have had a means of acquiring knowledge of the truth does not debar recovery, there being no duty to investigate. The rule was recently stated in *Twining v. Thompson*, 68 Cal. App. (2d) 104, 156 P. (2d) 29, as follows:

“Where there is no legal duty of a plaintiff to investigate and no such circumstance is present as would put a reasonably prudent man upon inquiry, the mere fact that a means of acquiring knowledge is available to plaintiff and he has not made use of such means does not debar plaintiff from recovering after he makes the discovery. (*Tarke v. Bingham*, 123 Cal. 163, 166 (55 P. 759).) Innocent parties do not carry the burden of inquiry. (*Hart v. Walton*, 9 Cal. App. 502, 509 (99 P. 719).)”

Appellant offered no evidence whatsoever in the case at bar which proved, or tended to prove, that the insurer had knowledge of the falsity of any material representation concerning the health or medical history of the insured. The nearest approach to a circumstance which might have cast suspicion upon the completeness and truthfulness of insured's answers was the fact that appellee had information indicating that insured had, at some time or other, consulted a Dr. Lissner, who was an associate of Dr. Rosenfeld. It appears, however, that appellee had no knowledge concerning the date or the purpose of the supposed consultation with Dr. Lissner.

Appellant urges that appellee is estopped to assert that it relied upon the representations of the insured concerning his health and medical history by reason of the fact that Dr. Waste, the insurer's medical examiner, examined the insured and made a report indicating a favorable opinion as to his insurability. This contention is clearly without merit. In the first place, the requirement of medical examinations in connection with applications for life insurance is practically universal. In nearly every cited case dealing with concealment and misrepresentation in connection with an application for life insurance, it appears that the insured had submitted to a medical examination and that a report of such examination was received and considered by the insurer in connection with the application. It is manifest that such fact affords no basis for claim of waiver or estoppel.

In the second place, it is a matter of universal knowledge, affording a basis for judicial notice, that a great many serious diseases and ailments, including diseases of the heart and circulatory system, are latent, and may not be disclosed objectively even upon the most careful physi-

cal examination. Indeed, Dr. Waste so testified in this case [R. 223, 224]. It is in recognition of this obvious truth that the courts have uniformly held that insurance companies are entitled to receive full, complete and truthful answers from the insured concerning his health, medical history, past complaints and ailments.

POINT V.

There Can Be No Waiver of the Insurer's Right to Rescind Upon Grounds of Misrepresentation and Concealment Until After the Insurer Has Become Aware of the Falsity of the Representations.

The defenses of estoppel and waiver asserted by appellant herein are closely related. Accordingly, the decision in *Gates v. General Casualty Co. of America*, 120 F. (2d) 925, and the cases therein cited are also pertinent to the defense of waiver.

It is, of course, well settled that a party asserting affirmative defenses of waiver and estoppel bears the burden of proving such defenses by clear and convincing evidence. (8 *Couch Encyclopedia of Insurance Law*, Sec. 2238, p. 7281.)

And in the case of *California Western States etc. Co. v. Feinstein*, 15 Cal. (2d) 413 at p. 422, 101 P. (2d) 696 at 701, it is stated:

“Nor may it be said that the insurer could have waived its right to rescind, on the ground of false representations made by the insured in his answers to the questions as set forth in the application for reinstatement, until the insurer had become aware of the falsity of those representations. (*McDanel v. General Ins. Co.*, *supra*; *Schick v. Equitable Life Assur. Soc.*, 15 Cal. App. (2d) 28, 34 (59 Pac. (2d)

163).) It was only after the insured had filed his claim for disability payments in June, 1936, at which time an investigation was made with regard to the ailments for which he had undergone treatment by a physician, that the falsity of the representations which the insured had made in the application for reinstatement was disclosed. On that state of the record it cannot be said that the insurer had waived any of the rights which it subsequently asserted against the insured."

In *Schick v. Equitable Life Assur. Soc.*, 15 Cal. App. (2d) 28, at page 34, the following from 67 C. J. 310, is quoted with approval:

"The evidence must show knowledge, at the time the waiver is claimed to have occurred, of all the material facts that would probably have influenced the conduct of the party; the proof must be clear that the party against whom the doctrine of waiver is invoked knew what his rights were. A waiver cannot be established by a consent given under a mistake of fact."

Appellant's affirmative defenses of waiver and estoppel necessarily failed because he did not sustain his burden of proving them and because the uncontradicted evidence established that the insurer received no knowledge or information whatever concerning the matters misrepresented and concealed until after investigation was made subsequent to the death of the insured. The insured's death occurring so soon after the issuance of the policy and from the causes indicated by the death certificate naturally suggested the propriety of such investigation.

POINT VI.

The Insured Having Executed an Express Waiver of the Physician-Patient Privilege, the Trial Court Did Not Err in Admitting the Testimony of Physicians Who Had Been Consulted by the Insured.

Appellee submits that appellant's brief does not properly specify the errors relied upon in the manner required by Rule 20(d) of the rules of this court, especially with reference to alleged errors in the admission of evidence. Appellant has failed to quote either the grounds of objection urged at the trial or the substance of the evidence admitted. Moreover, the specifications of error are not limited to the scope of the statement of points served and filed pursuant to Rule 75(d) of the Federal Rules of Civil Procedure and set forth in the appendix to appellant's opening brief. Nevertheless, appellee will show that the contentions made by appellant are without merit.

The insurer called two physicians, who testified that they had been consulted by the insured prior to the date of the application for the policy in suit. The testimony of these witnesses proved, or tended to prove: (1) That prior to the date of the application, insured (a) had suffered from, and complained of, dizziness, nausea and pain in the chest, (b) had been taking nitroglycerine tablets prescribed for the relief of heart pain, (c) had suffered a slight stroke which had rendered him unable to rise from his bed for a week, (d) had submitted to numerous physical examinations in which electrocardiographs were taken; and (2) that from a time anterior to the application to the date of his death, insured had suffered from arteriosclerosis and angina pectoris, which were serious, chronic and progressive diseases of the circulatory system

and which contributed as immediate causes of insured's death.

Appellant argues that the trial court erred in overruling objections to this testimony made upon the ground that it related to privileged matters concerning which the physicians could not properly be examined by virtue of the provisions of Section 1881, subdivision (4) of the California Code of Civil Procedure. This statute provides in part that "a licensed physician or surgeon can not, *without the consent of his patient*, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; * * *." (Italics supplied.) The prohibition of the statute is subject to a number of qualifications and exceptions which need not be noted here.

It is undisputed in this case that the insured executed Part II of the application containing the following provision:

"* * * I expressly waive to such extent as may be lawful, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired, and I authorize any such disclosure."

By the quoted language, the consent of the *patient* was unequivocally given. It thus appears that *appellant*, as beneficiary of the policy in suit, sought to assert a privilege which was personal to the insured and which the

insured had expressly waived. It is well settled law that the privilege is effectively waived by a provision to that effect in an application for insurance.

8 *Wigmore on Evidence*, 3rd Ed., §2388, p. 831;

70 *Corpus Juris*, §633, p. 466;

27 *Cal. Jur.*, §43, p. 59;

Wirthlin v. Mutual Life Ins. Co., 56 F. (2d) 137;

Lincoln National Life Ins. Co. v. Hammer, 41 F. (2d) 12;

New York Life Ins. Co. v. Renault, 11 F. (2d) 281.

Wigmore expresses the rule as follows:

“(b) An *express waiver by contract*, *e. g.*, in a policy of insurance, may be given effect, on the general principle already noticed in §7a. Since experience has shown that the testimony of physicians who might assist the discovery of the truth is likely to be suppressed by the insured’s claim of privilege, and since the contract of insurance is a voluntary transaction for both parties, the insurer’s insistence on a provision of this sort in his contract is no more than a reasonable measure of self-protection, and does not affect the interest of patients in general other than the insured party to the contract.”

Appellant apparently does not deny the validity or the effectiveness of an express waiver of the privilege such as was signed by the insured in this case. No decision cited by appellant holds or intimates that such a waiver is not valid and effective.

However, it appears to be appellant's contention that the insured's express waiver of the privilege became an integral part of the contract, and that the insurer's rescission of the contract operated to destroy the effectiveness of the waiver.

This novel and ingenious argument lacks the support of reason or authority. The rule that a party may not rescind a contract and, at the same time, claim benefits under it has no application here. Appellee seeks no benefit and asserts no substantive right which is not entirely consistent with its rescission and repudiation of the contract.

Rather, it is appellant who, with obvious inconsistency, has sought to *recover* upon the contract and, at the same time, to repudiate a waiver which he, himself, describes as an "integral part" of the contract.

We are dealing here, not with a rule of substantive law, but with a rule of evidence. Under the provisions of Rule 43(a) of the Federal Rules of Civil Procedure, "*the statute or rule which favors the reception of evidence governs,*" and it is important to note the further provision of the rule that "*the competency of a witness to testify shall be determined in like manner.*"

Manifestly, the testimony of these physicians concerning their observations of the insured, their objective findings and their diagnoses was not hearsay. The declarations of the insured concerning his pains, complaints and suffering not only were a part of the *res gestae*, but also

were admissible under another recognized exception to the hearsay rule which is stated by *Wigmore* as follows:

“It is for statements of physical pain or suffering that the exception has been longest recognized and the principle most fully and clearly reasoned out.” (*Wigmore on Evidence* (3rd Ed.), Vol. VI, Secs. 17, 18, p. 63.)

Moreover, the insured's declarations were admissible to prove his knowledge of material facts concerning his health, which facts were fully established by other evidence. (*Missouri State Life Ins. Co. v. Young*, 38 F. (2d) 399; *Wigmore on Evidence* (3rd Ed.), Vol. II, Sec. 266(a), p. 91.)

Indeed, appellant limited his objections to disclosures made subsequent to the date of the application [R. 100], recognizing the admissibility of declarations and disclosures anterior thereto. Furthermore, the record shows that appellant, himself, expressly and in writing, authorized the disclosure of all the information which he now claims was privileged [R. 403, 404]. The record further shows that these authorizations executed by appellant were received by third parties and were used to obtain all of the information which appellant claims to be privileged [R. 231 *et seq.*; also, 240 *et seq.*]. Under these circumstances, appellant is estopped to assert any objection to the testimony of these physicians on the ground of privilege.

Estate of Visaxis, 95 Cal. App. 617, 273 Pac. 165.

POINT VII.

Appellant Has Wholly Failed to Sustain His Burden of Showing Error in the Findings of the District Court.

Appellant, of course, carries the burden of showing this appellate court that the findings of the District Court are clearly erroneous.

F. R. C. P., Rule 52(a);

Augustine v. Bowles, 149 F. (2d) 93, 96;

Gates v. General Casualty Co. of America, 120 F. (2d) 925, 929.

Appellee has shown by reference to the record that every finding of the trial court is supported by an abundance of substantial evidence. Indeed, the findings that material facts were falsely represented and concealed and the finding that insured was not in good health were required by uncontradicted evidence.

Appellant has not challenged either the admissibility or the reliability of the testimony of the witness Ludden, the pharmacist who, on June 1, 1942, filled (and many times afterward refilled) the prescription for nitroglycerine tablets which were to be taken for "heart pain" [R. 401].

The uncontradicted testimony of the pharmacist that the insured complained of pain in his chest and desired the prescription "*as soon as possible*" [R. 88] sufficed to prove the falsity of the material representation in the application that insured had never suffered from pain or pressure in the chest. The fact that insured was taking

medicine for the relief of heart pains and submitting to repeated examinations and electrocardiographic studies proved, beyond all reasonable doubt, that he knew of his condition.

Conclusion.

Appellee submits that the judgment under review is sustained by well settled rules of law, and that appellant has failed entirely to show error in any particular. Therefore, the judgment should be affirmed.

Respectfully submitted,

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ROY L. HERNDON,

Attorneys for Appellee.

No. 11180

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ, as executor and executrix of the last will and testament of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN

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No. 11180

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ, as executor and executrix of the last will and testament of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's brief attempts to obscure the controlling elements of this case and requires no reply other than a correction of some of the misapprehensions created therein. Appellant's Opening Brief is otherwise ample answer, and he will not incur the record by its reiteration.

Summarizing, Appellant will confine himself, in this reply, to the following points:

1. There is no issue in this case with respect to Question 29 of Part II.
2. The California Insurance Code imposes upon the "insurer" the duty of making investigation of that which

it has "the means of ascertaining" and which "in the exercise of ordinary care" it "ought to know." It is "presumed" and "bound to know" that which is "equally" open to its "inquiry." Its right to information of the material facts is "waived" by its "neglect to make inquiries as to such facts," particularly "where they are distinctly implied in other facts of which information is communicated."

3. No false representation was made and nothing was concealed from appellee.

4. Appellant, neither in fact nor in legal contemplation, adopted "as his own" the statements of Abe Lutz in Part II.

5. Appellee cannot have its cake and eat it too.

6. Appellee concedes that the testimony of attending physicians of Abe Lutz with respect to the latter's statements to said physicians, including all subjective symptoms, were hearsay as to appellant.

7. The defenses of waiver and estoppel compel reversal of the trial court's judgment.

I.

**There Is No Issue in This Case With Respect to
Question 29 of Part II.**

Appellee has injected a false issue in this case. Appellee's amended complaint does not allege that the whole or any part of the answer of the "insured" to question 29 in Part II (requesting full description of illnesses, diseases or injuries and since childhood) contains either any concealment or any false representation [I, 2, 17].

The issues in this connection are tendered by Paragraph IX of the amended complaint [I, 6, 9] and are joined, without aid or of said complaint, by Paragraph IX of Appellant's answer [I, 24-26].

While said complaint alleges that Abe Lutz, the so-called "insured," gave and stated all the answers to all the questions in said Part II with intent to deceive appellee "in answer to *certain* of the questions" (emphasis added), nevertheless, said complaint identifies said "*certain* of the questions" with a particularity which excludes said question 29 of said Part II.

Said complaint alleges, and there is no aid or thereof in appellant's answer, that the alleged false representations and concealment relied upon by appellee to vitiate the policy are with respect to *only* questions 35, 36 and 44 [I, 8, 9].

This is emphasized by Paragraph X of said complaint [I, 9-10], which alleges that appellee did not know that

“said representations” and “said answers” were false and untrue and that had it known

“that within *one* year preceding the date of said application for said insurance, said Abe Lutz [appellant’s father, the so-called “insured”] had consulted a physician and been treated by a physician for *pains in the chest, dizziness, shortness of breath and palpitation of the heart*, and had plaintiff known that Abe Lutz had in fact *suffered from dizziness and fainting spells, palpitation of the heart, shortness of breath, pains and pressure in the chest*, it would not have issued said policy of life insurance.” (Emphasis added.) etc.

This is again demonstrated in Paragraph XIII of said complaint [I, 11-13] which alleges, in so far as is here pertinent, that “after the death of said Abe Lutz * * *, and * * * receipt * * * of proofs of death * * *, plaintiff * * * first * * * received information leading it to * * * an investigation * * * to determine whether said answers were true, * * *

“That as a result of said investigation and examinations plaintiff company first learned that * * * said Abe Lutz had, prior to the date of said application for said insurance, suffered from, had consulted a physician for, and been examined by a physician for indigestion, dizziness and fainting spells, palpitation of the heart, shortness of the breath and pains and pressure in the chest and had, within approximately one year prior to the date of said application and other than in August, 1942, consulted a physician and been treated by a physician for, and had suffered from each and all of the ailments hereinabove *particularly described and alleged.*” (Emphasis added.)

The Issues.

In this connection, the amended complaint alleges, and appellant's answer denies that his father, Abe Lutz:

A. In or by his answers in his medical examination referred to in the application (part 1) for insurance as "Part 2," falsely or fraudulently represented to appellee that he:

1. Had never suffered from:

- (a) Indigestion;
- (b) Insomnia;
- (c) Nervous strain or depression;
- (d) Overwork;
- (e) Dizziness or fainting spells;
- (f) Palpitation of the heart;
- (g) Shortness of breath;
- (h) Pain or pressure in the chest.

2. Had not consulted or been treated or examined by any physician or practitioner other than Dr. Maurice H. Rosenfeld in August, 1942, and for a physical examination and blood sugar determination, with normal result, *within five years* immediately preceding November 14, 1942, the date of said application.

B. Falsely or fraudulently concealed the fact that he had consulted and been treated by physicians:

1. Within *five years* prior to November 14, 1942, the date of said application, for:

- (a) Dizziness or fainting spells;
- (b) Palpitation of the heart;
- (c) Shortness of breath;
- (d) Pain or pressure in the chest.

2. In January, 1937, for nausea and dizziness;
3. In June, 1942, for pains in the chest;
4. In July, 1942, for
 - (a) Dizziness or nausea;
 - (b) Pains in the chest;
 - (c) Indigestion;
 - (d) Palpitation of the heart;
 - (e) Various ailments and diseases.

It will be noted that "various ailments and diseases" last above mentioned as subdivision "(e)," although broad and comprehensive to infinity, is, nevertheless, limited to the month of *July, 1942*, during which month, as will be hereinafter disclosed, Abe Lutz saw only one doctor, Dr. Rosenfeld, and saw him only once, to wit, on July 6, 1942, with no complaints whatsoever [I, 115]. Even on this date, July 6, 1942, the doctor had made no definite diagnosis of any ailment or disease and certainly no diagnosis of any heart condition, and in his private thinking with respect to Abe Lutz' condition, only had suspicions; he "suspected the possibility" of a heart condition [I, 116] but he did not tell Abe Lutz what he "suspected" nor what his conclusions were [I, 117], explaining that his conclusions based on his suspicions were "just for my own information and a follow-up for further diagnostic evidence" [I, 117].

Duodenal Ulcer, Coronary Thrombosis, and the “Tentative” “Suspicion” of Dr. Rosenfeld That It Was “Probable” That Abe Lutz Had Mild Angina Pectoris Have No Relevancy, and Are Foreign, to Any Issue in This Case.

DUODENAL ULCER:

Just before Abe Lutz died, “he was sent to the hospital because he had an acute duodenal ulcer; that is, an ulcer of the stomach” [I, 120]. Duodenal ulcer was one of the contributing causes of death [II, 420]. Appellant’s father had been afflicted with said duodenal ulcer slightly over two months prior to his death [II, 420]. In other words, the insured did not become so afflicted until well over a year after the effective date of the policy. He did not have such an ulcer when the application was signed [II, 420].

CORONARY THROMBOSIS:

This was the “*immediate contributing*” cause of the death of Abe Lutz [I, 119]. Appellant’s father was so fatally stricken *only* “several hours” or “immediately preceding his death” [I, 143]. According to the death certificate, Abe Lutz had been so afflicted one day [II, 420]. In other words, Abe Lutz did not acquire this affliction until well over nineteen months after the effective date of the policy. Dr. Rosenfeld, the sole author of this diagnosis, testified that normal, healthy appearing people suffer from *fatal* attacks of coronary thrombosis without any previous symptoms thereof [I, 143], and that in all of the examinations that he, Abe Lutz’ attending physician, made, from the first time Abe Lutz became his patient up until the fatal attack (a period of over 7 years, *i. e.*,

from 1-16-37 to 5-28-44), there were no symptoms, subjective or objective, which could be ascribed to coronary thrombosis [I, 144]. In short, Abe Lutz did not have coronary thrombosis when the application was signed on November 14, 1942.

ANGINA PECTORIS, OR "MILD ANGINA PECTORIS":

This is irrelevant and foreign to any issue in this case for at least four reasons, to wit:

1. As elaborated in points "(a)" and "(b)," pages 21 to 28 of appellant's opening brief, Abe Lutz the socalled "insured" is not a party to the contract of insurance and neither the policy nor the law provide that appellant's rights in the premises are predicated upon the conduct of the insured.

2. Neither any alleged falsity nor any alleged concealment in the answers of Abe Lutz to question 29 in Part II (requesting full description of ailments, diseases or injuries had since childhood) is in issue in this case as is hereinabove explained.

3. There is no evidence in the record that as of any date subsequent to August 11, 1942 (over three months prior to the date of the application) and prior to April 7, 1944 (when Dr. Rosenfeld next saw Abe Lutz after August 11, 1942), there was any diagnosis, qualified or unqualified, or either angina pectoris or "mild angina pectoris." While, over appellant's objection [I, 122-123], Dr. Rosenfeld stated that it was his "belief," in *retrospection*, that Abe Lutz had angina pectoris during the period between November 1, 1942 and December 9, 1942 [I, 122-123], nevertheless, he neither saw Abe Lutz nor prescribed any

medicine for him during the entire period of over nineteen months between August 11, 1942, and April 7, 1944 [I, 143-144]. Further, the above mentioned testimony of Dr. Rosenfeld, made *in retrospect*, after the death of said Abe Lutz, should have been, and the trial court thought that it was excluded and expunged from the record as is demonstrated by the statement of the court to that effect in the court's opinion where, speaking of evidence elicited from Dr. Rosenfeld, Judge Jenny said:

“The testimony limits the information obtained by Dr. Rosenfeld from the deceased (Abe Lutz) to that period of time prior to November 16, 1942.” [I, 355.]

Inasmuch as there is no competent evidence with respect to any unfavorable state of the health of Abe Lutz when the application was *approved* and the first premium thereon was *paid*, it therefore follows that the *after death* diagnosis of angina pectoris is irrelevant and foreign to appellee's claim that when the application was approved and the first premium thereon was paid that Abe Lutz was not in good health.

4. There was no diagnosis of angina pectoris until after the death of Abe Lutz [II, 420]. Dr. Rosenfeld, the sole author of that *ultimate* diagnosis, first acquired “suspicions” that Abe Lutz had “mild angina pectoris” on June 1, 1942; the symptoms “were very mild” [I, 136]. Angina pectoris was only “suspected” [I, 107], and it was Dr. Rosenfeld's policy not to make any statements which would make the patient unduly apprehensive when he found a

condition involving a *suspicion* of heart infirmity [I, 119, 135], and in lieu thereof he told Abe Lutz about the latter's "potential diabetic condition" [I, 107] and prescribed nitroglycerine [I, 106], sometimes prescribed for high blood pressure [I, 135], for relief of the pain of the *suspected* mild angina pectoris [I, 106, 137] and advised curtailment of activities and reduction of weight by diet "to improve this potential diabetic condition" [I, 106, 137]. The doctor's *unrevealed* "suspicions" on June 1, 1942, were tentative only [I, 137]. Those suspicions were "*probably* angina pectoris, *probably* due to the coronary artery narrowing," which latter narrowing, the doctor thought, was "*probably* progressive" [I, 106] (The emphasis on the three appearances of the word "probably" in the two phrases last above quoted is of course added). Based on "very mild" symptoms [I, 136] and *probabilities*, the doctor only had "tentative" "suspicions" of "mild angina pectoris." Even this tentative *suspicion* the doctor did not reveal to Abe Lutz, who was merely reminded by the doctor "to improve this potential diabetic condition" [I, 106, 137].

Even as late as July 6, 1942, the fourth time Abe Lutz was seen by Dr. Rosenfeld after June 1, 1942, the doctor reserved any diagnosis, and in answer to the question

"On July 6, 1942, did you tell the patient what your diagnosis and conclusions were?"

he answered,

"No, sir, that was just for my own information and a followup for further diagnostic evidence" [I, 117].

Dr. Rosenfeld merely revealed his "suspicion" [I, 117]. Dr. Rosenfeld then explained that it was possible for a person to have mild angina pectoris and thereafter effect a *complete recovery*, and that many times a person will have all the symptoms and, over a period of time and treatment, effect a complete recovery [I, 149].

On August 7, 1942, the next visit of Abe Lutz to Dr. Rosenfeld, Mr. Lutz had no complaints. "The examination and the discussion on that day was primarily referable to the patient's diabetic problem." Mr. Lutz was told "that his blood sugar was essentially normal" [I, 118].

On August 11, 1942, the next visit of Abe Lutz with Dr. Rosenfeld and the last time the doctor saw Mr. Lutz before April 7, 1944 when the latter was stricken with his fatal illness [I, 144], Mr. Lutz had no complaints. The doctor testified that although his *suspicion* was the same, nevertheless "there was no increase in impairment" [I, 118]. It is to be noted that even on this late date there was still no definite diagnosis or certainty of Abe Lutz' affliction which the doctor, even on this last visit prior to the fatal illness of Abe Lutz, referred to as "the condition I suspected" [I, 118]. Additionally, Dr. Rosenfeld testified, the over-all picture was that the patient was improving; he was better; he had improved [I, 141]. Mr. Lutz had recovered from the pain [I, 150]. His appearance was that of a normal appearing man in every way [I, 144].

The first and only diagnosis of angina pectoris is the one made by Dr. Rosenfeld after the death of

Abe Lutz, when, in retrospection and realization that “an acute coronary thrombosis” was “the immediate contributing cause” of the patient’s death [I, 119], he signed the certificate of death [II, 420].

The *unalleged*, but now, by appellee, claimed concealment of affliction with angina pectoris, or “mild angina pectoris,” is not an issue in this case because when Part II was signed no one was competent to determine the fact as to whether Abe Lutz was so afflicted, other than a medical expert, Dr. Rosenfeld in the instant case, and with him, even in his own private thinking, said affliction was not a fact and remained only a *suspicion* until death by reason of another affliction, to wit, coronary thrombosis, as the “immediate contributing” cause, occurred.

It is pertinent, at this point, to point out the fact that under the law even a *party* to a contract of insurance is not bound to communicate to the other, *even upon inquiry*, information of his own *judgment* upon the matters in question. We refer to and quote California Insurance Code, Sec. 339, to wit:

“*Information of party’s own judgment.* Neither party to a contract of insurance is bound to communicate, *even upon inquiry*, information of his own judgment upon the matters in question.” (Emphasis added.)

California Insurance Code, Sec. 339.

It is unfair, after the lips of Abe Lutz are sealed by death, and it would offend all principles of equity, to assert that Abe Lutz concealed affliction with angina pectoris (which he did not *know* that he had,

hoped and *prayed* that he did not have, and *tried* to avoid by following the best medical advice he could secure) when he was constrained to rely and depend upon expert medical advice for diagnosis and such expert medical advice (to wit, that of Dr. Rosenfeld, a heart specialist), in lieu of diagnosis, had and furnished only "tentative" judgment of "suspicions" or "probability."

II.

The California Insurance Code Imposes Upon the "Insurer" the Duty of Making Investigation of That Which It Has "the Means of Ascertaining" and Which "in the Exercise of Ordinary Care" It "Ought to Know." It Is "Presumed" and "Bound to Know" That Which Is "Equally" Open to Its "Inquiry." Its Right to Information of the Material Facts Is "Waived" by Its "Neglect to Make Inquiries as to Such Facts," Particularly "Where They Are Distinctly Implied in Other Facts of Which Information Is Communicated."

Appellee, at page 22 of its brief, urges that it was under no legal duty to investigate. It makes this argument by incongruous analogy to *Twining v. Thompson*, 68 Cal. App. (2d) 104, which is not an insurance case, and to the contrary involves a long unapprehended fraud of a fiduciary and the court in that case merely held, as to the trusting and unsuspecting plaintiff partner who was defrauded, that "* * * the mere fact that a means of acquiring knowledge is available to plaintiff and he has not made use of such means does not," in that character of situation, "debar plaintiff from recovering after he makes

the discovery. * * * Innocent parties do not carry the burden of inquiry. * * *.”

The difference in the relation between the (“applicant for”) purchaser of insurance and the (“insurer”) vendor thereof, on the one hand, and, on the other, the fiduciary relationship between copartners (as is involved in the *Twining v. Thompson* case, *supra*, from which appellee’s inappropriate and misleading above mentioned quotation is taken), is obvious. The law with respect to *investigative* duty is not the same in the situation present in this case which involves the “applicant for insurance” (appellant) and the “insurer” (appellee), as it is as between copartners who are fiduciaries as to each other and thus are not dealing “at arm’s length.” It is obvious that appellee is totally without authority in support of its argument in this connection by reason of its having cited and quoted an excerpt from such an inappropriate reference as is the *Twining* case, *supra*.

In addition to the case law on the subject, a statutory duty of investigation is imposed upon the insurer by California Insurance Code, Sections 332, 333, 334 and 336, as follows:

By No. 332, entitled “Required Disclosures,” the insurer must investigate, *i. e.*, ascertain, “all facts” which it has “the means of ascertaining” inasmuch as the other party to the insurance contract, the *applicant for insurance* (appellant), is only required to communicate to the *insurer* such material facts “within his knowledge” as to which he makes no warranty and which the insurer

“has not the means of ascertaining.” (Emphasis added.)

Adding emphasis, we quote *California Insurance Code*, Section 332, in full as follows:

“Required Disclosures. Each party to a contract of insurance shall communicate to the other, in good faith, all facts *within his knowledge* which are or which he believes to be material to the contract and as to which he makes no warranty, *and which the other has not the means of ascertaining.*”

332 *California Insurance Code.*

NOTE:

Abe Lutz' waiver of privilege and express authorization for full disclosure invested the appellee “insurer” with “the means of ascertaining” all facts which it now claims were concealed from and misrepresented to it.

By Section 333, entitled “Matters Not Required to Be Disclosed Except Upon Inquiry,” the *applicant for insurance* (appellant), except in answer to the inquiries of the *insurer* (appellee), is not bound to communicate information of matters which, in the exercise of ordinary care, the *insurer* ought to know or as to which the *insurer* “waives communication.” Adding emphasis, we quote in part *California Insurance Code*, Section 333, as follows:

“Matters Not Required to Be Disclosed Except Upon Inquiry. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows.
2. Those which, *in the exercise of ordinary care*, the other *ought to know*, and of which the party has no reason to suppose him ignorant.
3. Those of which the other waives communication

4. * * *

5. * * *.”

333 *California Insurance Code.*

By Section 335, entitled “Presumed Knowledge,” the *insurer* (appellee) is “bound to know” all the matters which may affect the perils contemplated, and which are “open” to its inquiry “equally” with that of the *applicant for insurance* (appellant). Adding emphasis, we quote in part *California Insurance Code*, Section 335 as follows:

“Presumed Knowledge. Each party to a contract of insurance is *bound to know*:

(a) All the general causes which are *open to his inquiry equally with that of the other*, and which may affect either the political or material perils contemplated.

(b) * * *.”

335 *California Insurance Code.*

NOTE:

It should here be observed that the matters allegedly misrepresented as well as those allegedly concealed by Abe Lutz (there is no allegation that appellant misrepresented or concealed anything) were open to the *insurer's* (appellee's) “inquiry equally with that of” the *applicant for insurance* (appellant). In fact, such matters were more open to *insurer's* (appellee's) inquiry inasmuch as appellee was (and appellant was not) armed and implemented with Abe Lutz' said waiver of privilege and express authorization for full disclosure, and the name and address of Dr. Maurice H. Rosenfeld.

By Section 336, entitled "Waiver of Right to Information," the *insurer* (appellee) "waived" its "right to information of material facts" which it claims were concealed from it by its "neglect to make inquiries as to such facts," particularly as is true in the instant case at bar, where such facts were "distinctly implied in other facts of which information [was] communicated." Adding emphasis, we quote in part *California Insurance Code*, Section 336, as follows:

"Waiver of Right to Information. The *right* to information of material facts may be *waived* * * * by *neglect to make inquiries* as to such facts, where they are distinctly implied in other facts of which information is communicated."

336 *California Insurance Code*.

NOTE:

All "information of material facts" which appellee claims was concealed from or misrepresented to it was "distinctly implied" in the following "other facts of which information" was "communicated" to appellee:

1. That Abe Lutz had:

- (a) been declined for insurance. [Question 28 of Part II; I, 44; II, 406];
- (b) been suspected of having sugar or albumen in his urine [Question 37 of Part II; I, 44; II, 406];
- (c) lost 15 pounds in weight in then recent months [Question 32 of Part II; I, 44; II, 406];
- (d) consulted and had physical examination by Dr. Maurice H. Rosenfeld of 1908 Wilshire Blvd. in Los Angeles during the then preceding August, 1942, then less than three months earlier [Question 36 of Part II; I, 44; II, 406];

2. That Dr. Rosenfeld was a heart specialist and checked Abe Lutz' heart [I, 218];

3. That Abe Lutz had a history of diabetes [I, 216];

4. That Abe Lutz had been rejected for insurance on account of sugar in his urine [I, 216];

5. That appellee's medical examiner had examined Abe Lutz several times previously [I, 216].

Knowing that Dr. Rosenfeld was a heart specialist, that he had checked Abe Lutz' heart and given him a physical examination, together with a blood sugar determination, together with Abe Lutz having been declined for insurance on account of sugar in his urine, and having a history of diabetes, "distinctly implied" that Dr. Rosenfeld was in possession of information of facts material to a proper determination of the physical condition of Abe Lutz which also implied that Dr. Rosenfeld had properly taken a history from Abe Lutz. All "information of material facts" which appellee claims was concealed from or misrepresented to it were ultimately elicited from Dr. Rosenfeld. Even the information elicited from Dr. Seech, over appellant's objection upon the trial of this case, was known to Dr. Rosenfeld.

It follows therefore by the provisions of *California Insurance Code*, Sec. 336, that appellee "waived" its "right to information of material facts" which it claims were concealed from it, by its "neglect to make inquiries as to such facts" inasmuch as such facts were "distinctly implied" in other facts of which information was "communicated" to it.

California Insurance Code, Sec. 336.

III.

**No False Representation Was Made and Nothing
Was Concealed From Appellee.**

Ample treatment of this point is contained in appellant's opening brief and particularly under subdivision "(h)" thereof, pages 53 to 61 both inclusive, to which reference merely is made to avoid reiteration. Additionally, however, it should be observed that "concealment" is defined by California Insurance Code, Sec. 330, as

neglect to communicate that which a party *knows* and *ought to communicate*.

Further, appellant was not under any duty to disclose any facts which appellee had "the means of ascertaining,"

California Insurance Code, Sec. 332.

or, except in answer to specific inquiry, any facts which "in the exercise of ordinary care" appellee ought to have known or ascertained,

California Insurance Code, Sec. 333

or, any facts concerning information to which appellee waived its right by its "neglect" to make inquiry.

California Insurance Code, Sec. 336.

There were no false representations as is clearly demonstrated in the above mentioned subdivision of appellant's opening brief, mere reference to which is again made to avoid reiteration.

The above mentioned Insurance Code sections are relatively well amalgamated into succinct form in the case of

Columbia Nat'l Life Ins. Co. v. Rodgers, 116 F. (2d) 705, 707, where it is said that:

“An insurance company may be charged with knowledge of facts which it ought to have known. See, *Supreme Lodge K. P. v. Kalinski*, 163 U. S. 289, 16 S. Ct. 1047, 41 L. Ed. 163. Knowledge which is sufficient to lead a prudent person to inquire about the matter, when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed.”

IV.

Appellant, Neither in Fact Nor in Legal Contemplation, Adopted “As His Own” the Statements of Abe Lutz in Part II.

Appellee grudgingly concedes that the only parties to the insurance contract involved in this case are appellee, as the “insurer,” and appellant, as the *assured*. Obviously the deceased Abe Lutz, as the so-called “insured,” *waived* certain rights (when he signed the waiver of privilege and express authorization for full disclosure), but in so doing he acquired no rights. Abe Lutz appears in this transaction as simply the *life* (not the individual) insured, *i. e.*, the contract or policy was “*about*” him but not “*with*” him. His death merely furnished the contingency upon which the liability of the *appellee* insurer to the assured *appellant* was made to depend.

Appellee apparently concedes this, or at least makes no argument and cites no authority to the contrary. Appellee seeks to cover its default on this issue by argument supported by neither authority nor logic, that appellant (on

11-14-42) adopted as his own the (11-16-42) statements of Abe Lutz in Part II because:

1. The policy provides that "all statements made by the insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties"; and

2. Appellant, in signing the application (Part I) on November 14, 1942 (2 days before Abe Lutz, as the only signer thereof, signed Part II on November 16, 1942), agreed that Part II (then in blank and unsigned) should "become a part of every policy issued" on said application (Part I).

This argument, if it may be called "argument," involves a *non-sequitur*. No one would claim that appellant *adopted as his own* the statements of Charles Dickens if the application (Part I) had contained an agreement that Charles Dickens' Christmas Carol should become a part of every policy issued on said application (Part I). In further illustration of that which we submit is an illogical conclusion which appellee seeks to establish in this connection, it may be further observed that if the policy had provided that all statements made by Charles Dickens or in his behalf, in the absence of fraud, should be deemed representations and not warranties, the fact would remain that whether the statements were representations or warranties they would nonetheless be the representations or warranties of Charles Dickens and not the representations or warranties of the applicant for insurance.

No where in the application, and no where in the policy is there any provision whereby appellant adopts the statements of Abe Lutz as his own statements. There is no evidence in the record to even indicate that appellant had

any personal knowledge of any material fact falsely stated to or concealed from appellee. Neither the contract of insurance nor the law provides that the policy can be vitiated by appellee by reason of the false representations or the concealment of any one who is not a party to the contract of insurance.

No where in the law can be found any principle of either law or equity which provides that, in the absence of express agreement, contracting parties as between themselves will be bound or their contractual relationship be affected by the statements, warranties, representations, or conduct of any non-contracting party or parties. Certainly, in the case at bar, appellant has found no principle of law or equity, and appellee has cited none, which assert that under facts such as those in the instant case appellant, as a matter of law, is deemed to have adopted as his own the statements of Abe Lutz contained in said Part II.

V.

Appellee Cannot Have Its Cake and Eat It Too.

Appellee continues to stand on the insurance contract in suit simultaneously repudiating it. It continues to urge that the express waiver of privilege signed by Abe Lutz became an integral part of the contract of insurance which it has, in and by *its* action in the instant case, sought to and succeeded, to date, in cancelling, rescinding and repudiating as *void*. In its brief it even seeks to justify its inclusion of the express waiver in the insurance contract by a quotation from *Wigmore* which, in part, is as follows:

“* * * Since the contract of insurance is a voluntary transaction for both parties, the insurer’s insist-

ence on a provision of this sort in his contract is no more than a reasonable measure of self protection.

* * *.”

Without citation of authority, appellee then proceeds to try to “brush off” by characterizing as “novel and ingenious” appellant’s quotation (at page 34 of its opening brief) from *Grant v. Sun Indemnity Co.* (1938), 11 Cal. (2d) 438, 440, to wit:

“The insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit.”

It is respectfully submitted that after appellee has made the waiver a part of and it has become merged into the contract of insurance by the very terms of the contract, appellee, as the insurer, may not repudiate the policy, deny all liability thereunder, and at the same time stand, or be permitted to stand, on any provision inserted therein for its benefit.

Austin v. Hallmark Oil Co. (1943), 21 Cal. (2d) 718, 727 (5);

Grant v. Sun Indemnity Co. (1938), 11 Cal. (2d) 438, 440.

VI.

Appellee Concedes That the Testimony of Attending Physicians of Abe Lutz With Respect to the Latter's Statements to Said Physicians, Including All Subjective Symptoms, Were Hearsay as to Appellant.

Appellee concedes that the complaints and statements of Abe Lutz to his attending physicians, Drs. Rosenfeld and Seech, including all subjective symptoms, were hearsay as to appellant. Appellee merely urges, at page 29 of its brief, that:

“* * * the testimony of these physicians concerning their observations of the insured, their objective findings and their diagnosis was not hearsay.”

Appellee confirms its concession that hearsay was erroneously admitted in this case by asserting, without citation of authority, that the statements of Abe Lutz to his attending physicians as to his history, complaints and symptoms, were a part of the *res gestae*. Appellee does cite and quote from *Wigmore* in this connection, but only to the effect that exclamations of physical pain which do constitute a part of the *res gestae* constitute the oldest and “most fully and clearly reasoned out” exception to the hearsay rule.

All of the facts which appellee claims were falsely represented to or concealed from it were, or were based upon, subjective symptoms. Appellee tries to ignore this

by the following sweeping comment at page 30 of its brief:

“Moreover, the insured’s declarations were admissible to prove his knowledge of material facts concerning his health, *which facts were fully established by other evidence.*” (Emphasis added.)

Prompted by the italicized portion of the last above quoted excerpt from appellee’s brief, appellant asks appellee the oratorical question: What facts *material to the issues in this case* “were fully established” by evidence other than statements of Abe Lutz to said attending physicians, including statements by Abe Lutz as to his subjective symptoms?

Truth is implicit in the last above quoted statement from appellee’s brief, to wit: It is true that it is not enough to prove “knowledge” without establishing the fact with respect to which proof of “knowledge” is pertinent. This is apropos of appellee’s reference to the testimony of the witness Ludden which was admitted over appellant’s objection only for the purpose of showing knowledge. Knowledge itself without substantial showing of other facts is not sufficient to support the finding of false representation or concealment. The trial court expressly limited the testimony of the witness Ludden to the establishment of knowledge of Abe Lutz., *i. e.*, knowledge of pain. Evidence admitted merely for the purpose of showing *knowledge* cannot be later extended to supply the lacking element of competent evidence to establish the *facts* of which only knowledge has been proved.

VII.

**The Defenses of Waiver and Estoppel Compel
Reversal of the Trial Court's Judgment.**

Appellee does not answer and makes no serious attempt to answer appellant's discussion of the evidence and authorities with respect to the defenses of waiver and estoppel. The cases cited by appellee with respect to waiver and estoppel at pages 20 to 25 both inclusive of its brief are merely inapplicable to the facts in this case. The *Twining v. Thompson* (68 Cal. App. (2d) 104), case which we have previously discussed, does not even have anything to do with the law of insurance and is totally inapplicable. The insurance cases cited by appellee involve, in each instance, facts which are totally different from those in the case at bar.

The substance of appellee's effort to answer appears to be that unless appellee had *knowledge* of the validity of the representations, the defenses of waiver and estoppel are inapplicable. This assertion ignores the special uncontroverted facts as shown by the undisputed evidence in this case and the law applicable thereto. Appellee has made no criticism of appellant's statement of the facts bearing on this phase of the matter. Clearly, appellee, under the sections of the California Insurance Code hereinabove cited, is chargeable with knowledge of the facts which it had "the means of ascertaining." Clearly too, the other party to the insurance contract is not bound to communicate information of matters which the insurer, in the exercise of ordinary care, ought to know, and the insurer's failure under such circumstances to ascertain such information constitutes its waiver of its right to such information. Knowledge which is sufficient to lead a prudent

person to inquire about the matter, when it could have been conveniently done, constitutes notice of whatever the inquiry would have disclosed.

Columbian Nat'l. Life Ins. Co. v. Rodgers, citing *Supreme Lodge, K. P. v. Kalinski*, 163 U. S. 289; 41 L. Ed. 163.

Furthermore, appellee, by failing to differentiate the instant case from the *Turner* case, has by implication confessed the application of the doctrine of waiver and estoppel therein applied to the paralleling facts involved in this case. In the *Turner* case, as in this case, the insurer made no investigation when it was furnished with the names of the attending physicians of the insured and issued its policy and accepted the premiums, thus lulling the policyholder into believing that the policy of insurance was a valid and subsisting contract between the parties. Under those facts, the court in the *Turner* case (13 Cal. App. (2d) 573), did not hesitate to and did apply the doctrine of both waiver and estoppel.

The ease with which appellee could have investigated and ascertained the information with respect to the facts which it claims were concealed from and misrepresented to it, is demonstrated by the self-evident fact that appellee's agent, Harold Morgan, did contact the office of Dr. Rosenfeld before delivery of the policy to appellant, but for reasons satisfactory to Mr. Morgan, he did not personally talk to Dr. Rosenfeld [I, 147]. Dr. Rosenfeld testified that no one on behalf of the appellee ever contacted him until after the insured's death [I, 148]. Dr. Rosenfeld further testified that all of the information concerning which he testified in open court was available to

appellee prior to the death of Abe Lutz. Certainly if inquiry had been made of Dr. Rosenfeld before issuance of the policy, all of the information which the appellee now claims was concealed from or misrepresented to it by Abe Lutz could have been conveniently and easily ascertained.

Additionally, estoppel is predicated upon appellant's change of position in reliance upon the validity of the policy in suit. In reliance thereon appellant cancelled, to his financial prejudice, other policies on the life of Abe Lutz, his father [I, 187-188]. Further, appellee, without complaint or investigation, accepted from appellant two annual premiums.

The language in the *Turner* case is so pointed as applied to the conduct of appellee in the instant case, particularly as applied to the defenses of estoppel and waiver, that we quote from page 578, as follows:

"Defendant had placed at its disposal the exact source from which it could obtain the information which it now maintains was withheld from it. It did not choose to make any inquiry but issued its policy with extreme promptness to say the least, and accepted deceased's money for six years, during all of which time defendant led her to believe she had a valid and enforceable policy of insurance on her life. Under such circumstances defendant should not be permitted to come into court after death had sealed the insured's lips and prevented her from explaining, if she could, why she did not mention an operation in 1926 when she did mention an illness and treatment by physicians which, we conclude from

the evidence and proffer of proof, occurred at the same time as the operation. The illness and some treatment though not the correct organ involved, were disclosed, and only the fact of an operation to effect a cure was withheld."

That there was a *duty to investigate* in this case, as in the *Turner* case, in view of the knowledge possessed by appellee, is stated by the court in the following language:

"As defendant made no investigation when it should and could have, and as it issued its policy of insurance, accepted Mrs. Turner's money for six years and lulled her into the secure belief that she had a valid policy of life insurance, it must be held that it *waived* the misstatement in the application and is now *estopped* from asserting the purported fraud." (Emphasis added.)

The case of *Gates v. General Casualty Co. of America* (120 F. (2d) 925), cited by appellee at page 20 of its brief, does not involve the special facts presented in the instant case by which knowledge of the insured's health and other factors were brought to the knowledge of the insurer which was thus put on notice. Neither *Telford v. N. Y. Life Ins. Co.*, 9 Cal. (2d) 103, *Frederick v. Federal Life Ins. Co.*, 13 Cal. App. (2d) 585, nor *Maggini v. West Coast Life Ins. Co.*, 136 Cal. App. 472, involve facts similar to those in the instant case. It is significant too that appellee has failed to comment upon sections 332, 333, 335 and 336 of the *California Insurance Code* pertaining to the waiver of its right to information of material facts (which it claims were misrepresented to and concealed from it) by its neglect to make inquiries as to such facts

where they were distinctly implied in other facts of which information was communicated.

Even assuming (without conceding, because the law clearly is to the contrary) that appellee was under no duty to make any investigation, nevertheless, it affirmatively appears that appellee did not rely upon the adequacy or accuracy of the answers of Abe Lutz in said Part II, and on the contrary sought, through its Los Angeles "general agents" [I, 271], to obtain information concerning:

1. Why Dr. Lissner (a doctor whose name was not mentioned by Abe Lutz in Part II) was consulted?
2. Why Dr. Rosenfeld was consulted?
3. What were the symptoms?
4. What were the findings?
5. What treatment or advice was given?
6. What were the results [II, 432].

In other words, appellee, by its own interpretation of the answers of Abe Lutz in Part II, felt that they were inadequate, or in any event appellee was concerned to the point that it desired and requested "full details" in this regard [II, 432] which obviously appellee must therefore have felt that it did not have. This request of appellee was made to its "general agents" in Los Angeles simultaneously and concurrently with its letter [II, 432] in explanation of its telegram [II, 427] to its general agents in Los Angeles dated December 1, 1942, advising that the issuance of the policy in suit was approved but that appellee was unable to consider two requested additional policies on the life of Abe Lutz without a more complete answer to the questions in Part II.

Having initiated an investigation and thus been “on inquiry,” appellee is chargeable with knowledge of whatever such an investigation would have revealed and it cannot defend itself merely by saying that its Los Angeles general agents carelessly and negligently failed to make the requested investigation. The policy was thereafter delivered to appellant (not delivered to Abe Lutz) and appellant paid and appellee received and retained two annual premiums thereafter. The evidence upon the trial of the instant case was so strong in favor of the negligent and abortive investigation made by appellee that the following appears in Paragraph XXIII of the findings of fact:

“It is true that plaintiff’s representatives *contacted* the office of the *physician* of said *insured*, but it is not true that they obtained, or that plaintiff had the opportunity of obtaining, full, true or correct information from such physician regarding the physical condition and health of said insured.” (Emphasis ours.)

The latter portion of the above quoted finding can be no stronger than the uncontraverted evidence which was to the effect that appellee had not contacted Dr. Rosenfeld [I, 146-148] but that Dr. Rosenfeld, had he been contacted by appellee, would have made available to appellee all of the evidence and information (disclosed at the time of the trial), which appellee now claims to have been withheld from and misrepresented to it.

Conclusion.

We respectfully submit that appellant has demonstrated that the trial court erred in the respects herein and in the opening brief enumerated, and that the judgment should be reversed.

Respectfully submitted,

McLAUGHLIN, MCGINLEY & HANSON,
WILLIAM L. BAUGH,

Attorneys for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit.

C. F. LYTLE CO., an Iowa corporation, GREEN CONSTRUCTION CO., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation,

Appellants,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased,

Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED
FEB 20 1946

PAUL P. O'BRIEN,
CLERK

No. 11217

United States
Circuit Court of Appeals

For the Ninth Circuit.

C. F. LYTLE CO., an Iowa corporation, GREEN CONSTRUCTION CO., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation,

Appellants,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

Proctors for Appellants:

MESSRS. MATTHEW STAFFORD and

G. H. BUCEY of Merritt, Summers, Bucey
& Stafford,

840 Central Building,
Seattle 4, Washington.

Proctor for Appellee C. M. Whipple:

MR. J. CHARLES DENNIS, United States
Attorney,

1017 U. S. Court House,
Seattle 4, Washington.

Proctor for Appellee Clark Nutt:

MR. L. M. KOENIGSBERG,

508 Central Building,
Seattle 4, Washington.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

In Admiralty—No. 14797

C. F. LYTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation,
and UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Maryland corporation,
Libelants,

vs.

C. M. WHIPPLE,

Respondent.

LIBEL

The libel of C. F. Lytle Co., an Iowa corpora-
tion, Green Construction Co., an Iowa corporation,
and United States Fidelity & Guaranty Com-
pany, a Maryland corporation, against C. M. Whip-
ple in a cause civil and maritime for review of
an order of the United States Compensation Com-
mission under Public Law 208 of the 77th U. S.
Congress, Act of August 16, 1941, as amended,
alleges:

I.

That C. F. Lytle Co. is a corporation organized
under the laws of the State of Iowa and having its
principal place of business in the State of Iowa;
that Green Construction Co. is a corporation or-
ganized under the laws of the State of Iowa and
having its principal place of business in the State
of Iowa; that United States Fidelity & Guaranty

Company is a corporation organized under the laws of the State of Maryland and having its principal place of business in the State of Maryland, but qualified to do and doing business in the State of Washington. That during the year 1942 libelants C. F. Lytle Co. and Green Construction Co. were engaged together in a joint venture in the prosecution of a contract with the United States of America; that the work under such contract was subject to the provisions of Public Law 208 of the 77th U. S. Congress, Act of August 16, 1941, as amended; that the underwriter of the obligations under that law of said joint venture was United States Fidelity & Guaranty Company, hereinabove described.

II.

That C. M. Whipple is and was on July 3, 1945, the duly appointed, qualified and acting Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission with his office located in Seattle, King County, Washington, and in the judicial district of the United States of America in which this suit is brought; that the said Fourteenth Compensation District includes the Territory of Alaska, U.S.A.

III.

That on June 26, 1942, William Earnest Nutt met his death at or near Big Delta, Territory of Alaska, U.S.A.; that for some time prior to June 26, 1942, William Earnest Nutt had been employed

by the joint venture hereinabove described in the prosecution of the contract hereinabove described; that said William Earnest Nutt left surviving him no widow but did leave surviving him three minor children; that on June 14, 1943, a claim for compensation under Public Law 208 of the 77th U.S. Congress, Act of August 16, 1941, as amended, was filed in the office of respondent Deputy Commissioner by Clark Nutt, guardian of said three minor children of William Earnest Nutt, namely, Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt.

IV.

That after the claim described in the last preceding paragraph had been filed in the office of respondent Deputy Commissioner the claimant and libelants herein through their respective counsel had stipulated in writing that respondent Deputy Commissioner could and should consider as the record in this case (a) a transcript of the testimony taken at a coroner's inquest held at Fairbanks, Alaska, on June 29, 1942, before the Honorable William N. Growden, United States Commissioner and Ex-Officio Coroner in and for Fairbanks Precinct of the Fourth Judicial Division of the Territory of Alaska, United States of America; and (b) the depositions consisting of transcripts of written interrogatories and answers thereto of Messrs. A. A. Lyon, William H. Green, Ralph Green, and Robert Nine, all of which transcripts

were filed in the office of said Deputy Commissioner C. M. Whipple.

V.

That after said stipulation was made and after said transcripts had been filed in the office of said respondent Deputy Commissioner, on July 3, 1945, said respondent Deputy Commissioner filed in his office the compensation order and award of compensation of which a copy is hereto attached and by this reference made a part hereof as fully as though set out herein verbatim; that the C. F. Lytle Co., Green Construction Co., and United States Fidelity Guaranty Company named in said compensation order and award of compensation are identical with the libelants in this suit.

VI.

That the record hereinabove described remains in the possession of respondent Deputy Commissioner as his record in this case and will be filed in this court and in this proceeding by said respondent Deputy Commissioner. That by this reference to said record libelants incorporate said record in this libel as fully as though set out herein verbatim.

VII.

That the compensation order and award of compensation of July 3, 1945, hereinabove described, a copy of which is hereto attached, is not in accordance with law because the record upon which this compensation order and award of compensation is based contains no substantial evidence that

the death of William Earnest Nutt arose out of and in the course of his employment and because the same record establishes affirmatively that the death of William Earnest Nutt was occasioned solely by the intoxication of said William Earnest Nutt.

VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore, the libelants pray that a citation according to the practice of this court may be issued against the said C. M. Whipple citing him to appear and answer on oath the matters aforesaid; and that this honorable court may be pleased to decree the suspension and setting aside in its entirety, by injunction or otherwise, of the compensation order and award of compensation made and filed by respondent herein on July 3, 1945; and that libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

HAYDEN, MERRITT, SUMMERS &
STAFFORD, MATHEW STAFFORD
and A. W. MURRAY.

MATTHEW STAFFORD,
A. W. MURRAY,

Proctors for Libelants.

United States of America,
State of Washington,
County of King—ss.

A. W. Murray, being first duly sworn on oath deposes and says: That he is Attorney and Supt. of Claim Dept. of the United States Fidelity and Guaranty Company, a Maryland corporation, and that he makes this verification for and on behalf of said libelant; that this deponent has had personal direction of the investigation and litigation of the claim of William Earnest Nutt described in the foregoing libel and that the allegations contained in said libel are true to the best of his knowledge, information and belief; that this deponent verifies this libel for the reason that no officer of the United States Fidelity & Guaranty Company is within this district.

A. W. MURRAY.

Subscribed and sworn to before me this 19th day of July, 1945.

[Seal] MATTHEW STAFFORD,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Jul. 19, 1945.

[Title of District Court and Cause.]

LIBELANT'S STIPULATION FOR COSTS

Whereas, a libel and complaint was filed in this court on the 19th day of July, 1945, by C. F. Lytle Company and Green Construction Company and

United States Fidelity and Guaranty Company against C. M. Whipple, Deputy United States Compensation Commissioner for the reasons and causes in said libel mentioned, and the said C. F. Lytle Company and Green Construction Company and United States Fidelity and Guaranty Company, Libelants, and the American Surety Company of New York, as Surety, parties hereto, hereby consent and agree that in case of default or contumacy on the part of the Libelant or their surety, execution may issue against their goods, chattels and lands for the sum of Two Hundred Fifty Dollars (\$250.00).

Dated this 19th day of July, 1945.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of Whom It May Concern:

That the stipulators undersigned shall be and are bound in the sum of Two Hundred Fifty Dollars (\$250.00) conditioned that C. F. Lytle Company and Green Construction Company and United States Fidelity and Guaranty Company, Libelants, above named shall pay all costs as shall be awarded against them by this Court, or in case of appeal, by the Appellant Court.

[Seal] AMERICAN SURETY COM-
PANY OF NEW YORK.

By J. A. HODSON,
Resident Vice-President.

Attest:

K. F. WARRACK,
Resident Asst. Secretary.

[Endorsed]: Filed July 19, 1945.

[Title of District Court and Cause.]

APPLICATION FOR INTERLOCUTORY IN-
JUNCTION STAYING PAYMENT OF AN
AWARD

Come now C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity & Guaranty Company, a Maryland corporation, libelants herein, and apply for an interlocutory injunction allowing the stay of all payments required to be made by the terms of that certain compensation order and award of compensation heretofore on July 3, 1945, made and filed by respondent C. M. Whipple, Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission in his case No. DB-14-655-11 under Public Law 208 of the 77th United States Congress, Act of August 16, 1941, as amended, and in support of this application show and offer to prove, on hearing, that an irreparable damages will otherwise ensue to libelants herein by reason of the following facts:

1. That said compensation order and award of compensation, a copy of which is attached to the libel in this suit, which libel by this reference is hereby made a part hereof as fully as though set out herein verbatim, requires the libelants herein forthwith to pay to Clark Nutt the sum of \$1767.82 and hereafter to continue payments to said guardian at the rate of \$11.26 a per week; that said compensation order and award of compensation

further requires libelants herein forthwith to pay to Clark Nutt as an individual the sum of \$200.00.

2. That said libelants and petitioners herein are informed and believe that if said payments are made and that if thereafter said compensation order and award of compensation is suspended and set aside by this court, the amount so paid cannot be recovered from the payee.

Wherefore, these libelants and petitioners pray that this court issue an interlocutory injunction herein allowing libelants to stay all payments under the compensation order and award of compensation herein described pending final decision of the suit in which this interlocutory injunction is sought.

HAYDEN, MERRITT, SUMMERS &
STAFFORD, MATTHEW STAFF-
FORD and A. W. MURRAY.

MATTHEW STAFFORD,
A. W. MURRAY,

Proctors for Libelants.

United States of America,
State of Washington,
County of King—ss.

A. W. Murray, being first duly sworn on oath deposes and says: That he is Attorney and Supt. of Claim Dept. of the United States Fidelity & Guaranty Company, a Maryland corporation, and that he makes this verification for and on behalf of said libelant; that this deponent has had personal

direction of the investigation and litigation of the claim of William Earnest Nutt described in the foregoing application for interlocutory injunction staying payment of an award and that the allegations contained in said application are true to the best of his knowledge, information and belief; that this deponent verifies this application for the reason that no officer of the United States Fidelity & Guaranty Company is within this district.

A. W. MURRAY.

Subscribed and sworn to before me this 19 day of July, 1945.

[Seal] MATTHEW STAFFORD,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed July 19, 1945.

[Title of District Court and Cause.]

NOTICE OF APPLICATION FOR INTER-
LOCUTORY INJUNCTION

To Clark Nutt, as the legally appointed guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, minor children of William Earnest Nutt; and to J. O. Watson, Jr., their attorney; and to C. M. Whipple:

You Are Hereby Notified and please take notice that on July 30, 1945, at 10:00 A.M. or as soon thereafter as proctors can be heard, the undersigned proctors for libelants herein will bring on for hearing before the Honorable Judge John C. Bowen,

one of the judges of the above-entitled court, in his courtroom in the United States Court House, Seattle, King County, Washington, application of libelants herein for an interlocutory injunction allowing the stay of all payments under that certain compensation order and award of compensation heretofore made and filed on July 3, 1945, by C. M. Whipple, Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission in his Case No. DB-14-655-11, a copy of said application for interlocutory injunction being attached hereto and herewith served upon you.

Dated at Seattle, Washington, July 19, 1945.

HAYDEN, MERRITT, SUMMERS &
STAFFORD, MATTHEW STAF-
FORD and A. W. MURRAY.

MATTHEW STAFFORD,
A. W. MURRAY.

[Endorsed]: July 19, 1945.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

Court Room No. 1, Monday, August 6, 1945.

Honorable John C. Bowen presiding.

[Title of Cause.]

Now on this 6th day of August, 1945, Matthew Stafford, of Hayden, Merritt, Summers & Stafford,

appearing on behalf of libelant, this cause comes on for hearing on the libelant's application for Interlocutory Injunction. The same is called and denied.

[Title of District Court and Cause.]

DEFENDANT WHIPPLE'S MOTION TO
DISMISS LIBEL

Now comes the defendant, C. M. Whipple, Deputy Commissioner, United States Employees' Compensation Commission, by J. Charles Dennis, United States Attorney, and moves this Honorable Court to dismiss the libel herein for the following reasons:

1. That the libel herein does not state a cause of action and does not entitle the plaintiffs to any relief, nor does said libel state a claim against the defendant upon which relief can be granted;

2. That it appears from the libel, including the transcript of testimony, taken at the inquest before Honorable William N. Growden and the several depositions, all of which are made part of the libel by reference, that the findings of fact of the deputy commissioner in the compensation order filed by him on July 3, 1945, are supported by evidence and under the law said findings of fact should be regarded as final and conclusive;

3. That it appears from the libel, including the transcript of testimony and depositions above

referred to, that the compensation order filed by the deputy commissioner on July 3, 1945, complained of in the libel, is in all respects in accordance with law;

4. For such other good and sufficient reasons as may be shown.

/s/ J. CHARLES DENNIS,

/s/ HERBERT O'HARE,

Assistant United States At-
torney, Attorneys for C. M.
Whipple.

[Endorsed]: Filed Oct. 3, 1945.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by the parties hereto by their undersigned attorneys as follows:

That the record heretofore certified to this court by Honorable C. M. Whipple, Deputy United States Compensation Commissioner for the Fourteenth Compensation District as the record before him in the matter of the claim for compensation for the death of William Earnest Nutt, dated at Seattle, Washington, October 31, 1945, and listing forty-five separate documents (a copy of the certification being hereto attached and by this reference made a part hereof), shall be and is hereby agreed upon as the entire record which was submitted to the

United States Employees' Compensation Commission and particularly to said Honorable C. M. Whipple, Deputy Commissioner, in passing upon this claim.

It Is Further Stipulated that the record as so certified may become a part of the records and files herein for all purposes of this proceeding.

Dated at Seattle, Washington, November 5, 1945.

C. M. WHIPPLE,

By J. CHARLES DENNIS,

United States District Attorney.

By HERBERT O'HARE,

Assistant United States District Attorney.

Attorneys and Proctors for Respondent.

C. F. LYTLE CO.,

GREEN CONSTRUCTION CO.,

UNITED STATES FIDELITY
& GUARANTY CO.

By MERRITT, SUMMERS, BUCEY
& STAFFORD.

By MATTHEW STAFFORD,

Attorneys and Proctors for Libelants.

L. M. KOENIGSBERG.

By H. S. SANFORD,

For Claimant-Intervenor.

[Endorsed]: Filed Nov. 5, 1945.

United States Employers' Compensation Commission Longshoremen's and Harbor Workers' Compensation Act, Fourteenth Compensation District District, 300 Colman Building, First Avenue and Marion Street, Seattle 4, Washington.

CERTIFICATION

I hereby certify that the record before me in the matter of the claim for compensation for the death of William Earnest Nutt, now on appeal in C. F. Lytle Company, Green Construction Company, and United States Fidelity & Guaranty Company, libellants, v. C. M. Whipple, respondent, Admiralty No. 14797, W. D. Wash. N. D., consists of the following described documents attached hereto on each of which I have affixed the number corresponding with that of its description set forth below:

1. A full, true and correct copy of Letters of Guardianship in the Guardianship of Phyllis Elaine Nutt, et al, Minors, No. 6237.

2. Form US-262, Claim for Compensation in Death Case, filed on June 14, 1943, by Clark Nutt, Guardian of Phyllis, Kenneth and Raymond Nutt, Minors.

3. Form US-262, Claim filed by Clark Nutt individually for money expended for funeral expenses.

4. Preliminary Statement filed by J. O. Watson, Jr., Attorney for Minor children of William Earnest Nutt, Deceased, and Attorney for Clark Nutt, claimant for burial expense.

5. Letter to Deputy Commissioner W. A. Marshall, dated August 27, 1943, from J. O. Watson, Jr., Attorney.

6. Copy of letter to A. W. Murray, U. S. Fidelity and Guaranty Company, dated August 27, 1943, from J. O. Watson, Jr., Attorney.

7. Letter to Deputy Commissioner W. A. Marshall dated September 1, 1943, from A. W. Murray, U. S. Fidelity & Guaranty Co.

8. Letter to Deputy Commissioner W. A. Marshall, dated September 20, 1943, from A. W. Murray, U. S. Fidelity & Guaranty Co.

9. Copy of letter to J. O. Watson, Jr., dated September 21, 1943, from Deputy Commissioner W. A. Marshall.

10. Letter to Deputy Commissioner W. A. Marshall, dated September 27, 1943, from J. O. Watson, Jr.

11. Copy of letter to A. W. Murray, U. S. Fidelity & Guaranty Co., dated September 27, 1943, from J. O. Watson, Jr.

12. Copy of letter to J. O. Watson, Jr., dated October 15, 1943, from Howard W. Hedgcock, U. S. Fidelity & Guaranty Company.

13. Letter to Deputy Commissioner W. A. Marshall, dated November 5, 1943, from J. O. Watson, Jr.

14. Copy of letter to Howard W. Hedgcock, U.

S. Fidelity & Guaranty Company, dated November 5, 1943, from J. O. Watson, Jr.

15. Letter to Deputy Commissioner W. A. Marshall, dated November 29, 1943, from J. O. Watson, Jr.

16. Copy of letter to Howard W. Hedgecock, U. S. Fidelity & Guaranty Company, dated November 29, 1943, from J. O. Watson, Jr.

17. Letter to Deputy Commissioner W. A. Marshall, dated December 20, 1943, from J. O. Watson, Jr.

18. Copy of letter to Howard W. Hedgecock, U. S. Fidelity & Guaranty Company, dated December 20, 1943, from J. O. Watson, Jr.

19. Letter to Deputy Commissioner W. A. Marshall, dated January 10, 1944, from J. O. Watson, Jr.

20. Copy of letter to Howard W. Hedgecock, U. S. Fidelity & Guaranty Company, dated January 10, 1944, from J. O. Watson, Jr.

21. Letter to Deputy Commissioner W. A. Marshall, dated January 19, 1944, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Co.

22. Copy of letter to J. O. Watson, Jr., dated September 8, 1944, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Company.

23. Letter to Deputy Commissioner W. A. Marshall, dated October 26, 1944, from J. O. Watson, Jr.

24. Copy of letter to J. O. Watson, Jr., dated November 1, 1944, from Howard W. Hedgcock, U. S. Fidelity & Guaranty Co.

25. Letter to Deputy Commissioner W. A. Marshall, dated November 30, 1944, from J. O. Watson, Jr.

26. Copy of letter to J. O. Watson, Jr., and U. S. Fidelity & Guaranty Company, dated December 4, 1944, from Deputy Commissioner W. A. Marshall.

27. Letter to Deputy Commissioner W. A. Marshall, dated December 5, 1944, from Howard W. Hedgcock, U. S. Fidelity & Guaranty Company.

28. Letter to U. S. Fidelity & Guaranty Co., dated December 6, 1944, from Deputy Commissioner W. A. Marshall.

29. Letter to U. S. Fidelity & Guaranty Co. and J. O. Watson, Jr., dated February 15, 1945, from Deputy Commissioner C. M. Whipple.

30. Letter to Deputy Commissioner C. M. Whipple, dated February 16, 1945, from Howard W. Hedgcock, U. S. Fidelity & Guaranty Co.

31. Letter to Deputy Commissioner C. M. Whipple, dated February 27, 1945, from J. O. Watson, Jr.

32. Letter to J. O. Watson, Jr., dated March 1, 1945, from Deputy Commissioner C. M. Whipple.

33. Letter to Deputy Commissioner C. M. Whipple

ple, dated April 6, 1945, together with application for Approval of Attorneys Fees and Brief and Argument.

34. Letter to U. S. Fidelity & Guaranty Co., dated April 10, 1945, from Deputy Commissioner C. M. Whipple.

35. Letter to Deputy Commissioner C. M. Whipple, dated April 12, 1945, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Company.

36. Letter to Deputy Commissioner C. M. Whipple, dated April 14, 1945, from J. O. Watson, Jr.

37. Letter to Deputy Commissioner C. M. Whipple, dated June 11, 1945, with attached Reply Brief and Argument, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Co.

38. Copy of letter to J. O. Watson, Jr., dated June 16, 1945, from Deputy Commissioner C. M. Whipple.

39. Letter to Deputy Commissioner C. M. Whipple, dated June 15, 1945, with enclosed Rebuttal Brief, from J. O. Watson, Jr.

40. Transcript of proceedings before William N. Growden, United States Commissioner and ex-officio Coroner, Fairbanks Precinct, Fourth Judicial Division, Alaska, in the Matter of the Inquest upon the Body of William Earnest Nutt, deceased, at Fairbanks, Territory of Alaska, on June 29, 1942.

41. Deposition on written Interrogatories of A. A. Lyon.

42. Deposition on written Interrogatories of W. H. Green.

43. Deposition of written Interrogatories of Ralph Green.

44. Deposition of written Interrogatories of Robert L. Nine.

45. Compensation Order, Award of Compensation, filed July 31, 1945.

Seattle, Washington, October 31, 1945.

/s/ C. M. WHIPPLE,
Deputy Commissioner.

In the Commissioner's Court, Fairbanks Precinct,
Fourth Division, Territory of Alaska

In the Matter of the Inquest upon the Body of
William Earnest Nutt, Deceased. No. 176.

PROCEEDINGS

1942

June 29. I, William N. Growden, United States Commissioner and ex-officio Coroner in and for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, having been informed that William Earnest Nutt died under circumstances indicating suicide, thereupon issued an order for jury returnable at 2:00 o'clock P.M., June 29, 1942.

June 29. File & Enter Marshal's Return on Order for Jury, as follows:

United States of America,
Territory of Alaska—ss.

I Hereby Certify That I received the within Jury Order at Fairbanks, Alaska, on the 29th day of June, 1942, and that I served the same on the 29th day of June, 1942, at Fairbanks, Alaska, by summoning the following to act as Jurors in the above entitled case:

J. W. Siebenthaler, Fairbanks, Alaska;

James Mack, Fairbanks, Alaska;

Magnus Johnson, Fairbanks, Alaska;

O. P. Daun, Fairbanks, Alaska;

Franklin McGarvey, Fairbanks, Alaska;

George Bachner, Fairbanks, Alaska.

Dated at Fairbanks, Alaska, June 29, 1942.

J. A. McDONALD

U. S. Marshal

By PAT O'CONNOR,

Deputy

June 29. Issue Subpoena.

June 29. The above named jurors appeared in the Commissioner's Court Room at Fairbank's, Alaska, at the hour of 2:00 o'clock P.M. The jury were duly qualified and sworn, after which they

heard the sworn testimony of the following witnesses: James F. Browne, Otto Berg, Ray E. Johnston, Harold W. Johnston, Walter L. Wheelchel, Arthur J. Schaible, M. D., and John J. Buckley.

The jury then proceeded to the Tye Funeral Home where they examined the body, after which they returned to the U. S. Commissioner's Court Room, and, after due deliberation, returned the following verdict: (Name of Court and Title of Cause) Verdict.

We, the members of the duly empanelled Coroner's Jury in the aforesaid inquest, after having heard the sworn testimony of the various witnesses; having diligently inquired into the circumstances surrounding the death, and having personally inspected the body of William Earnest Nutt, and being fully advised in the premises, respectfully submit our findings and verdict, as follows:

The name of the deceased is William Earnest Nutt whose residence is Big Delta, Alaska.

The time of his death was approximately 11 P.M., June 26th, 1942.

The place of his death was 4 miles south of Big Delta on Richardson Highway.

The deceased came to his death by means of head and neck injuries sustained by falling from truck.

We find no one responsible for his death.

In Witness Whereof, we have set our hands this
29th day of June, 1942, at Fairbanks, Alaska.

FRANKLIN McGARVEY
GEORGE BACHNER
JAMES P. MACK
J. M. SIEBENTHALER
O. P. DAUN
MAGNUS JOHNSON

I approve the above rendered verdict.

[Seal] WILLIAM N. GROWDEN
U. S. Commissioner and
Ex-Officio Coroner.

June 29. Enter return on subpoena, as follows:
United States of America,
Territory of Alaska—ss.

I Hereby Certify That I received the foregoing
subpoena on the 29th day of June, 1942, at Fair-
banks, Alaska, and served the same by reading and
showing the original and delivering a ticket contain-
ing the substance thereof to each of the within
named witness James F. Browne, Otto Berg, Ray
E. Johnston, Harold W. Johnston, Walter L. Whel-
chel, Arthur J. Schaible, M. D., Personally.

J. A. McDONALD,
U. S. Marshal

By JOHN J. BUCKLEY,
Deputy

United States of America,
Territory of Alaska,
Fairbanks Precinct—ss.

I, William N. Growden, United States Commissioner, do hereby certify that the above and foregoing is a full, true and correct transcript of the proceedings In the Matter of the Inquest upon the Body of William Earnest Nutt, Deceased, as set forth in the Inquest Docket as Cause No. 176 on page 153 thereof.

[Seal]

WILLIAM N. GROWDEN

United States Commissioner

In the Commissioner's Court for Fairbanks
Precinct, Fourth Division, Alaska
No. 176

In the Matter of the Inquest Upon the Body of
William Ernest Nutt, Deceased.

TRANSCRIPT OF TESTIMONY

The above inquest was held at 2:00 o'clock P.M. on June 29th, 1942, before the Honorable William N. Growden, United States Commissioner and Ex-Officio Coroner, in the above entitled Court at Fairbanks, Alaska, and the following is the transcript of the testimony in full.

WALTER WELCHELL,

being first duly sworn, testified as follows:

Examination by Harry O. Arend, Assistant U. S. Attorney:

Q. Your name is Walter Welchell, is it?

A. Yes.

Q. Where do you live?

A. Do you mean my former address.

Q. Now. Where you are now?

A. Big Delta.

Q. Were you acquainted with William Ernest Nutt?

A. Not before I came up here.

Q. How long had you known him up here?

A. About 3 or 4 weeks.

Q. Was he working with you?

A. Yes. I am greasing machinery there.

Q. When did you last see him alive?

A. The day he was killed.

Q. What day was that?

A. Friday, the 26th.

Q. The 26th is Saturday. No Friday. Where did you see him?

A. Down at Rika's Roadhouse.

Q. What was he doing there?

A. There were a bunch of fellows down there. He went down in a truck to load up a boat. Otto Berg and I came down. We were going to see two Indians to buy a bear hide. We knew the fellows that were there because they all work there. We had a bottle of beer with them—two or three bottles of beer, I think. When the other truck got ready to go home that the gang went down with, they didn't

(Testimony of Walter Welchell.)

want to go home. There was Ernest Nutt and Jack and Ray, brothers, that wasn't quite ready to go home so they went with us. We left there and went up to Jimmy Brown's cabin. We had two checks for him that the bookkeeper gave to us to take down to him. We all went up there. When we started home there was Otto Berg—he was driving, mechanic up there and myself, and Jimmy Brown—we were in the front seat and Ray Johnston and Jack Johnston and Ernest Nutt were in the back of the truck. Ray was sitting right on the box. Jack was sitting with his back up next to the cab sitting on the edge of the box, and Ernest was sitting flat on the bottom too. Just about two minutes before it happened I glanced back through the glass and they were all laughing and talking and that is the last time I saw him alive.

Q. Then after that what happened?

A. The road was smooth in that spot. We felt a jar in the truck but otherwise we would never have known to stop. We thought we must have hit something or bumped under the hind wheel.

Q. Who was driving? A. Otto Berg.

Q. What kind of vehicle?

A. '37 or '38 truck. Dump truck.

Q. There were three in the back and three in the front? A. Yes.

Q. Did you hear any shouts just before you felt this? A. No.

Q. You didn't? A. No.

Q. Did you see the body afterwards?

(Testimony of Walter Welchell.)

A. I didn't go back to look. I was about ten feet from it.

Q. What did all of you do that were left in the car?

A. Well, Jimmy and Ray stayed there with the body and Otto, Jack and myself went in to camp to notify Mr. Cole, the bookkeeper.

Q. Did all the others go back to examine the body after the accident?

A. No. Otto and Ray and Jimmy went back.

Q. You did not?

A. No. I didn't go. I was feeling kind of bad. I was afraid to look at him.

Q. How old a man was he, to your estimation?

A. Looked like he would be around 45—a tall fellow.

Q. Had he been quarreling with any of the men?

A. No, he was a quiet fellow—very easy to get along with.

Q. Did he have any worries? Did he ever express any? A. Not to me, no.

Q. Was he very drunk.

A. No. He was feeling good, but not drunk so he didn't know what he was doing. He crawled in the truck by himself.

Q. Can you attribute any cause to the accident, as to why he might—

A. No. I couldn't figure out how it could happen.

Q. You didn't see him leave the truck?

A. No.

(Testimony of Walter Welchell.)

Q. Will you give me the names of the two who were in back with him?

A. Ray and Jack Johnston. Jack was sitting right on the edge of the box—no, on the edge of the box with his back against the cab.

Q. Has the company any restrictions against carrying men in dump trucks? A. No.

Question by Coroner: The men in the back were sitting with their backs to the cab?

A. Just one. Ernest and Ray Johnston were sitting flat on the bottom of the box.

Mr. Arend: Where did this happen? You can place it on the highway?

A. I judge it to be—estimate it three or four miles on the other side of Big Delta—well, the Tanana River.

Q. At the Tanana River?

A. On the other side. They call it Big Delta there.

Q. Did any other cars pass you while you were at that point? A. No.

Q. No other cars. Are there any other questions? Was this on a straight of way of the road, or on a curve? A. I believe it was straight.

Q. Did you take any special notice of the spot where you were?

A. No. I was pretty well riled up.

Q. You are not sure it was a straight of way?

A. There was no curves there, I am pretty sure. Not right there.

(Testimony of Walter Welchell.)

Q. Did you return at a later time to the scene of the accident? A. No.

(Witness excused.)

DR. A. J. SCHAIBLE,

being first duly sworn, testified as follows:

Q. What is your full name?

A. A. J. Schaible.

Q. You are a registered physician and surgeon?

A. Yes.

Q. How long have you engaged in practice?

A. Since November of last year here in Fairbanks.

Q. Before that? A. Since 1935.

Q. Were you acquainted with William Ernest Nutt? A. Not before his death.

Q. You did not know him. Did you have occasion to view his body last weekend? A. Yes.

Q. What day?

A. Saturday afternoon, about 4, I believe.

Q. Where did you see the body?

A. At the Tye Funeral Home.

Q. Did you make a close examination?

A. Yes. I didn't do a regular autopsy or post mortem. I didn't cut into the body at all. But I felt around it. The man—there was evidence that he had died from some injury. The left side of his face was black and scarred and also the left side of his chest and marks on his left arm. I signed the

(Testimony of Dr. A. J. Schaible.)

death certificate as cerebral concussion from the skull fracture. I learned subsequently that right after he was found his neck was turned completely around but when I saw him rigor mortis had set in and when I tried to move his neck it wouldn't move. He had a swelling on the side of his neck. I am satisfied that a severe injury caused his death—the cutting off of the spinal cord or a skull fracture. If the jury wants a definite diagnosis I would suggest ex-raying the man and we can see then whether his neck was broken.

Q. It would reveal it?

A. It would reveal that the bones were broken. What killed the man is the cutting of the spinal cord. It is possible for even a dislocation to cut that cord and kill a man instantly.

Q. How old was he? A. About 40 or 45.

Q. How tall?

A. Quite tall. I would judge in the neighborhood of 6 feet. I didn't measure him. He was quite muscular.

Q. Have you any—can you give any opinion as to what would have caused the bruises?

A. A fall from a truck—a fall from the truck with the truck running over him or striking him could have.

Q. The injury couldn't happen in the truck?

A. No. I doubt it. He gave the impression as if he had been dragged. He had a bunch of marks on the chest. Abrasions were on him—a single blow over the head—I don't think so.

(Testimony of Dr. A. J. Schaible.)

Q. The bruises were all on the face?

A. On the left side and on the chest and on the arm, as I recall it.

Q. Any open wounds?

A. There were abrasions. Skin rubbed off.

Q. No such thing as a bullet wound or knife wound?

A. No. Nothing like that.

Q. Were his eyes blacked at all. Was there swelling?

A. Yes, there was swelling over the left eye.

Q. It extended to the left eye, did it?

A. The left eye.

Q. You think that could have been made by the blow of a fist?

A. As I recall it, it had scratch marks as if he had hit something. A fist, you would expect to tear or you wouldn't expect the marks as you would get dragging a body over gravel. It didn't look like one single blow. It was something that jerked it.

(Witness excused.)

JOHN J. BUCKLEY,

being first duly sworn, testified as follows:

Q. Your name is John J. Buckley?

A. Yes, sir.

Q. You are the Chief Deputy Marshal for this Division?

A. Yes, sir.

Q. Were you acquainted with William Ernest Nutt?

(Testimony of John J. Buckley.)

A. No, I wasn't. Not until after his death.

Q. Did you see his body after his death?

A. Yes, sir.

Q. On what day?

A. On Saturday. Last Saturday, June 27th.

Q. At what time? A. About 3 o'clock A.M.

Q. Where?

A. About 3 miles south of Big Delta on the Richardson Highway.

Q. In what kind of surroundings?

A. He was laying in the road with his feet toward the bank of the road, lying on the shoulder of the road with his head quite close to the travel marks on the road. As a matter of fact, it was right on the edge of the travel wear of the road. Lying with his face looking towards the woods on the right hand side of the road going out.

Q. Were his feet pointing to Fairbanks or towards Valdez?

A. Right at that spot I don't know the directions but he was on the right hand side of the road with his feet pointing toward the ditch.

Q. Right hand?

A. He was lying this way (motioning) with his feet toward the ditch. Right on the shoulder.

Q. More cross ways of the road?

A. He was directly across the road.

Q. Any part of his body in the road bed?

A. His head was on the outside of the regular travel of the road.

Q. Just outside?

(Testimony of John J. Buckley.)

A. You would have to turn out around him to get around. There were marks there where cars had travelled.

Q. Was anyone else there?

A. Jim Brown and Ray Johnston and the book-keeper for Lytle and Green. I don't recall his name.

Q. Did anyone else go out with you?

A. Mr. Growden, U. S. Commissioner and I and Patrolman Buster Anderson.

Q. Did you make an inquiry there as to the cause of this man's death? A. Yes.

Q. What did you find?

A. I found out from Ray Johnston who was watching the body that they had been down to Big Delta and I found out later that they had been sent to Big Delta by the foreman to make some repairs on the boat which they had done and had been scheduled to go home about 8 or 8:30 in the evening. A man by the name of Otto Berg wasn't going back until later and these men, Nutt and the two Johnston brothers and one other decided to stay there and wait for Otto Berg. They had been drinking considerable and my information was that Nutt had drunk very heavily and had passed out. They put him in bed and he got up and seemed to be all right—got into the truck by himself and the three of them sat in the truck with their backs toward the cab. They travelled about three miles to where the body was when Ray Johnston said that Ernest Nutt made the remarks "There's a moose out there. Here's where I get off." The next thing they knew

(Testimony of John J. Buckley.)

he was gone, whether he fell out or jumped out. Johnston wasn't altogether sober. It appears that the ground at the point where he hit the ground was on a straight of way after they had gone around a small curve and had got out into the straight of way on the road and travelled 200 feet from the curve, and showed marks where he hit the ground apparently with his feet spread out. You could see where the ground was broke, and then evidently he went over on his head and face and slid on the ground. His right shoulder had a little bruise. His left side was all bruised and scratched and along his face where the flesh had hit, the gravel was ground into the side of his face. The body was warm when we got there. Both the Commissioner and myself looked for wounds on the body—picked up his head and I believe—we were certain his neck was broken because the neck was twisted around as though there was nothing there to hold it and we could feel what we thought was a broken vertebra—about the fourth vertebra from the skull. There was no other marks on the body except the evidence that he slid. I stepped that off from the place where he hit and the body had not been disturbed and it was about 20 feet. Otto Berg was questioned as to what speed he was travelling when he went around the curve and he said between 20 and 25 miles, and that was possible. After he got around this curve he felt the dual tire jump up in the air and strike the ground again. He stopped the car. He didn't know at the time that Nutt had gone over. He was

(Testimony of John J. Buckley.)

of the opinion that the dual tire on the right hand side of the car struck Nutt when he went over. The examination of the truck we made, the position Nutt was sitting, he couldn't have jumped out of the truck and been hit by the wheels. The car would be by him when he hit the ground. But that might be explained—that jar might be explained that when he got up he had to spring from the bottom of the truck to get out and he might have thought that was the jar. The clothing—he had on a slicker—one of these oil slickers—the marks on his left arm showed no imprint of any tire. Neither did his face or head or chest. You could see no marks at all of tire treads.

Q. Did you see the truck they were driving in?

A. Yes.

Q. Was there any possibility to fall between the body and the back of the cab?

A. No. The bed of the truck——

Q. You saw no evidence of tire marks on the body and in your opinion it wouldn't have been possible for him to fall under the back wheels if he jumped out.

A. If he jumped it would have been utterly impossible for him to strike the rear wheel. That was my opinion anyway because the truck bed is quite high—I think it is about four feet from the ground to the bottom of the bed of the truck then it has a ten-inch high box on it and above that a piece of wood to extend the box up higher. He would have to jump at least eighteen inches to spring over to

(Testimony of John J. Buckley.)

get away from it. By the time he hit the ground the truck would be by him.

Q. Did you see any evidence of foul play?

A. No.

Question by Jury: You think he went over the side of the truck?

A. He had to go out the side of the truck. The position showed that the first marks were on the right hand side outside the travel of the cars.

Q. You think he had been dragged?

A. I know he had been dragged—he skidded along the road.

Mr. Arend: He was dragged by his own force?

A. After he hit the ground, he collapsed, turned over and slid. Mr. Berg who was driving the truck at the time is almost certain in his own mind that the dual tire went over him, but there is no evidence that we can see and we looked for that after we talked to Berg, and we couldn't see any marks of the tire.

Q. Were any bones broken?

A. We couldn't find any. Only the neck. I tried his right ankle, the one he hit the ground with. There was no crunching of the bones and no fracture that we could feel.

(Witness excused.)

RAY JOHNSTON,

being first duly sworn, testified as follows:

Q. State your full name?

A. Ray Edward Johnston.

(Testimony of Ray Johnston.)

Q. Where do you live, Mr. Johnston?

A. Guernsey, Iowa.

Q. Where are you temporarily residing?

A. At Lytle and Green, Big Delta.

Q. Were you acquainted with William Ernest Nutt?

A. Yes, sir.

Q. How long had you known him?

A. Well, for the length of his stay out there—between 3 and 4 weeks.

Q. Did you see him last Friday, June 26th?

A. Yes, sir.

Q. Where did you see him at that time?

A. The last time I seen him—you mean alive?

Q. Yes. A. Was getting out of the truck.

Q. Where at?

A. Four or five miles north or south of Big Delta.

Q. At that time you saw him get out of the truck. What kind of truck?

A. V-8 dump truck. About a '39 or '40.

Q. Who all was in the truck?

A. There were 5 of us. Otto Berg, Jimmy Brown, Harold Johnston, Carl—I don't know Carl's last name—no, Walter. And myself.

Q. Where were you sitting at the time?

A. I was sitting in the left hand corner in the back of the truck on the floor.

Q. Who else was in the back?

A. Harold Johnston was sitting in the back and Ernie was sitting in the right side.

Q. Is Harold related to you?

(Testimony of Ray Johnston.)

A. My brother.

Q. Do they call him Jack?

A. That's right.

Q. Who was in the front? Who was driving?

A. Otto Berg was driving.

Q. Who was with him up in front?

A. Otto was driving and there was Walter and Jimmy Brown.

Q. How did Nutt get out of the car—truck?

A. He raised up and just stepped out—whether accidentally or how—but that's how he done it.

Q. You say he stepped out?

A. That's right.

Q. Did he have to make any effort?

A. No.

Q. Did you see him get up and get out?

A. Yes, sir.

Q. Will you demonstrate just how he did it?

A. He just got up and raised his foot over like that (demonstrating) and said "Let's get out and walk." I thought he was joking and didn't think he meant it.

Q. How fast was the car going?

A. I wouldn't think over 15 miles an hour.

Q. Did he make any other statement right at the time or just before?

A. Yes. He said just before that he saw a moose down there and said "Let's go get it." I pushed him back and said "These are rough roads. You'll fall out," and didn't think anything more of it.

Q. What did you do after he stepped out?

(Testimony of Ray Johnston.)

to the ground. It is several feet down. Those things happen so quick it is hard for a person to see.

(Witness excused.)

OTTO BERG,

being first duly sworn, testified as follows:

Q. Your name is Otto Berg?

A. That's right.

Q. Where is your home?

A. Des Moines, Iowa.

Q. Where are you temporarily residing?

A. Here now?

Q. Yes. A. At the camp at Big Delta.

Q. Were you acquainted with William Ernest Nutt? A. Yes. Just on this job is all.

Q. About how long had you known him.

A. I have known him since—I would say about three weeks.

Q. Did you see him last Friday, June 26th?

A. That was the day of the accident?

Q. Yes. Where did you see him?

A. Well——

Q. Just before the accident?

A. Just before the accident. It was on account of the weather the plant was shut down most of that day. Of course we were tied down there pretty much so at one I was talking in the office with the man in charge and asked him about maybe taking this truck and going down to Delta and wanted to know if there

(Testimony of Otto Berg.)

was anything he wanted. He said "Well that little truck has to be taken down and weighed and I have some checks for Jimmy Brown. You can take those down to him and spend a little time down there", so this Walter Welchell, he asked if he could ride along and I said "Sure". We drove down to Delta and got the truck weighed and came back by the roadhouse and stopped and this gang that had gone down before to load the boat—I didn't know they were down there, and Nutt was one of the gang. Everybody was having a few beers and I drank a bottle of beer myself. The boys got in the truck that they came down there with except this Nutt and two Johnston brothers. They stayed because I was there with my truck and they could go back with it. I took the checks up to Jimmy—I know Jimmy from the camp and we talked for a little while. So the boys came up there. We got ready to start back—of course the fellows taking it as a matter of fact that they would ride in the truck so this Nutt and the two Johnston boys were in the back of the truck and I drove the truck and Welchell and Jimmy Brown were in the front with me. The boys had been drinking but there wasn't any of them that weren't able to get in the truck. They seemed to be feeling good and to be O. K. otherwise.

Q. What were they drinking, beer or whiskey?

A. Possibly both. I couldn't say. The fact of the matter is I got a bottle of beer and it was sitting on the table and somebody drank it. I went out and talked to Rika. I would say they were drinking a little of both. This is something—I can't make my-

(Testimony of Otto Berg.)

self responsible for it in any way and yet it gets you. Driving the truck you couldn't know—I did know when I started out they were all three sitting down in the truck and supposedly we had gone about 11 miles and we weren't driving fast and so far as I was concerned possibly I was just like I am now.

Q. What time of the day did the accident happen?

A. I would say that it was possibly getting right towards 11 o'clock.

Q. At night? A. Yes.

Q. How did you know there had been an accident?

A. That's the thing. I stopped that truck because I knew something happened. There was a jolt or a bounce or whatever you would want to describe it as. Something—what it was I don't know. Something had to call my attention that something had gone wrong. It was just like the truck made a jolt like it had run over a rock and that's what called my attention to stopping the truck and of course I stopped it right there. It flashed through and I wondered if something was wrong. I watch my road pretty close.

Q. Have you determined what caused the jolt?

A. No, I can't determine it.

Q. Were there any rocks in the road?

A. I have never been back there after.

Q. What happened after you stopped the car?

A. After I stopped the car why Ray Johnston was out of the truck and then just a short distance Nutt was lying in the road. We went back there and tried

(Testimony of Otto Berg.)

to give him artificial respiration and do all we possibly could. I knew the man was gone.

Q. What did you do then?

A. I left Ray Johnston and Jimmy Brown there with the body and took the other two boys with me and drove back into camp as fast as I could and told Mr. Cole who is in charge what happened.

Q. Did you go back to the scene of the accident?

A. No, I didn't go back. Naturally that is quite a thing.

Q. Were you there long enough to make an examination of the body?

A. Not any more than—I didn't try to examine the body but it seemed that the body on one side was hurt. I was under the impression that the man's neck was broken, but I am no authority on that.

Q. Did you see any tire tracks across the body??

A. No, sir.

Q. Did you hear any quarreling?

A. Not a bit. None whatever. I am speaking of something there. In my opinion, being right with the boys I am satisfied there was nothing of that kind. The three of them separated and stayed and naturally the three of them were piling it together. There was no quarrelling or arguments amongst them prior to the time they got in the truck. What happened in the truck, I couldn't see because I was driving. I looked back a couple of times. We had just gone three or four miles I believe and——

Q. Did any other cars pass you while you were in that vicinity?

(Testimony of Otto Berg.)

A. No. There was—it seems to me that there was a truck heading North as we neared camp after the accident.

(Witness excused.)

(HAROLD WILLIAM) JACK JOHNSTON,

being first duly sworn, testified as follows:

Q. Will you state your full name, please?

A. Harold William Johnston.

Q. You are a brother of Ray Johnston?

A. Yes.

Q. Where is your home?

A. Deep River, Iowa.

Q. Where are you temporarily residing?

A. At Big Delta.

Q. Were you acquainted with William Ernest Nutt?

A. Not until he came here to work.

Q. About how long ago was that?

A. I imagine about four weeks, or something like that.

Q. Did you see him last Friday, June 26th?

A. Yes.

Q. Where at?

A. I seen him at camp and then when we went to load the boat.

Q. Where at? A. At Big Delta.

Q. What were you doing at Big Delta besides loading the barge?

A. I worked around there most of the afternoon

(Testimony of Harold William Johnston.)

and went across the river on the ferry and came home on a truck.

Q. Who was driving the truck?

A. Otto Berg.

Q. What time of the day did you leave for home?

A. I don't know exactly the time we did leave Big Delta. It was about 10:30 or 11 o'clock when the accident happened, but I had been out to Jimmy Brown's cabin.

Q. Where were you riding?

A. I was riding in the back end on the box.

Q. Who was with you?

A. Ernest Nutt and my brother, Ray.

Q. Who else was in the front with Otto Berg?

A. Jimmy Brown and Walter Welchell.

Q. You spoke of an accident—where did that happen?

A. I couldn't tell you exactly—about, I imagine, possibly 2½ or 3 miles, something like that. I'm all turned around in my directions.

Q. Towards camp from Big Delta? South on the highway?

A. That's right.

Q. Tell the jury the nature of the accident that happened.

A. I haven't got a whole lot to tell. I wasn't looking at the time he fell or jumped. The first thing I knew was when someone hollered and I turned. The first thing I seen he hit the ground and was rolling. But I didn't see him fall or didn't see him jump.

Q. What were you doing?

(Testimony of Harold William Johnston.)

A. I was sitting on the box in the front end and he was further back than I was.

Q. Where was your brother Ray?

A. He was behind me. I was clear in the front.

Q. Were you talking to Nutt?

A. Not at the time. I had been. I don't know just exactly the length of the time before but not very long.

Q. You fellows had been drinking quite a bit?

A. No. We had, I would venture to say, not over 3 or 4 bottles of beer.

Q. Did you have any whiskey?

A. One or two drinks.

Q. Did you feel the effects of your drinks?

A. Some. Not much. Not that I couldn't get around and couldn't walk straight.

Q. How about Nutt. Did he show any evidence of being too far?

A. Not more than anyone else. Just laughing and having a good time. So far as not being able to walk, he wasn't that way at all.

Q. Did you hear him say anything before he left the truck? A. No, I didn't.

Q. Did you feel sleepy at the time? A. No.

Q. Did you feel anything strike the car, or the car strike anything?

A. No. The road was so rough.

Q. What made the driver stop?

A. He said he noticed it, but being in the back and we weren't watching the road like the driver was.

(Testimony of Harold William Johnston.)

Q. How fast do you think you were going?

A. Not over 20 miles an hour I would say. 20 or 25 at the most.

Q. Was the road rough?

A. Not in that particular spot.

Q. Did the accident happen on a curve or a straight of way?

A. We were just around the curve. There is a little straight stretch, about 200 yards.

Q. When the car stopped what did you do?

A. I jumped out of the truck and by that time a couple of the others were back where he was lying and they told us to hurry on to camp and to get a doctor. I didn't get back to the body.

Q. Then you wouldn't know whether he was dead?

A. I didn't know.

Q. You did not go down to examine the body?

A. No.

Q. You and who else went to camp?

A. There was Walter Welchell, Otto Berg and I, I believe. That was all.

Q. After you got to camp did you come back again?

A. No.

Q. Did you hear—had Nutt been quarreling with anybody?

A. Not to my knowledge.

Q. Did he seem to have any worries? Did he express any to you?

A. No. I had worked with him practically all the time since he had been to camp.

Q. What kind of work did he do?

A. He was just a laborer.

(Testimony of Harold William Johnston.)

Q. Where was his home?

A. Indianola, Iowa, I believe.

Q. How old a man would you say he was?

A. Well—about 50 years old if I heard him say.
I don't whether that was exact.

Q. Did he have a family?

A. Yes. I don't know how many children. He had some children. He told about some living in California and I heard him tell about losing his wife some time in January. I am not sure when.

Q. How tall a man was he?

A. Approximately 6 foot or 6 foot 1.

Question by Coroner: When you speak of the way you were sitting in the truck going out—you were sitting closest to the cab?

A. That's right.

Q. Ray was sitting next? A. That's right.

Q. Mr. Nutt was farther back in the truck than he. In other words he was two-thirds of the way back in the truck?

A. I imagine approximately.

Question by Jury: Didn't anybody see him jump out of the truck?

A. I don't know.

Q. He went out over the side?

A. I don't know. When I seen him rolling or bouncing, I would say he went over the side because he was almost to the very edge of the road not over a couple of feet from the ditch along the side of the road. I would imagine he went over the side. I didn't see it.

(Witness excused.)

JAMES F. BROWN,

being first duly sworn, testified as follows:

Q. What is your full name?

A. James F. Brown.

Q. Where is your home? A. Big Delta.

Q. That's where you are at the present?

A. That's where my home is.

Q. That is your regular home? A. Yes.

Q. Were you acquainted with William Ernest Nutt? A. Slightly. Not very well.

Q. Did you see him last Friday, June 26th?

A. Yes.

Q. Where did you see him?

A. I saw him at my place. I saw him last on the roadway.

Q. Where is your place? A. At Big Delta.

Q. You saw him on the roadway?

A. That's the last I saw him.

Q. How did you happen to be on the road? You were traveling in a truck?

A. Yes, we were in a truck.

Q. Where were you going?

A. To Jarvis Creek.

Q. Who all was in the truck?

A. There was six of us.

Q. Do you remember their names?

A. There was—well you know how it is—Walt and Jack and Ott and Ray and Ernie and myself. I believe there was six altogether. Three in the back and three in the front.

Q. Who was sitting in the back?

(Testimony of James F. Brown.)

A. Jack and Ray and Ernie.

Q. The two brothers and Ernie?

A. And Ernie.

Q. Where were they sitting in respect to the box?

A. That I don't recall.

Q. You were in front with Otto Berg and Walter?

A. And Walt.

Q. About what time did the accident happen?

A. I would say about 10:30 or 11 o'clock, but I am not sure of the time.

Q. When did you first know there had been an accident?

A. When we stopped the truck.

Q. How did the truck happen to stop?

A. Well, all I can recall was that—I remember a few minutes before the truck stopped I glanced back and saw Ernie standing up in the truck.

Q. You saw him standing?

A. Yes, I am pretty sure of that. Some of the fellows say he wasn't, but I am positive, and I turned my head back and got to talking and then the next thing I knew just before we stopped there was a sort of a bump or a jar and we stopped. Then Ray had jumped out of the truck. I am sure of that. I was out and was going back to where Ernie was lying on the ground. I said maybe his wind is knocked out so let's give him artificial respiration, so I held his head and was counting and then I looked and saw he was really dying, so I said "It's no use." We stopped and one of the boys got something out of the truck and put it over his face and I

(Testimony of James F. Brown.)

told the boys to go back to the camp and tell Mr. Cole and call the Marshal.

Q. You stayed with the body?

A. Johnston and myself. We built fires on both sides of the body.

Q. Any cars pass while you were there?

A. I think there was one. No, I am not quite sure. I think George Edgecombe passed. I sort of lost my head.

Q. Did you stay there until the Marshal came?

A. Yes, I was present when they came. Mr. Buckley and Mr. Growden.

Q. You mention a jolt—have you determined what caused the jolt?

A. No. I wouldn't venture to say whether it was a bump in the road or whether the car could have hit him—I don't know. I can't associate that jolt with anything.

Q. Did you hear them talking in back?

A. No, you couldn't hear. We were talking in front.

Q. Was there any evidence of foul play at all.

A. No. I wouldn't think so. We were all friends and I can't imagine anything like that. I should hesitate to say there was.

Q. The party had been drinking?

A. We all had a few drinks.

Q. Did Nutt appear intoxicated when he got into the truck? A. Yes, he was.

Q. In your opinion he appeared to be drunk?

A. At my place he was so much so that I asked

(Testimony of James F. Brown.)

him to lie down on the bed. He laid on the bed while we were talking and when we got ready to go he was all right.

Q. Were the Johnston boys very far gone?

A. No. To be perfectly frank I was the worst of all. I was pretty tight myself. That's one reason I'm inclined to be pretty vague.

Q. You are the one who suggested the artificial respiration? A. Yes.

(Witness excused.)

CERTIFICATE

I, Emma M. Cook, Fairbanks, Alaska, hereby certify:

That I was the Court Reporter in the Commissioner's Court for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska; that I attended the inquest entitled "In the Matter of the Inquest Upon the Body of William Ernest Nutt, Deceased," No. 176, at Fairbanks, Alaska, on June 29th, 1942, and took down in shorthand the testimony given and proceedings had thereat; that I thereafter transcribed the testimony of all witnesses, namely, Walter Welchell, Dr. A. J. Schaible, John J. Buckley, Ray Johnston, Otto Berg, Harold Johnston and James F. Brown, and the foregoing pages numbered 1 to 16, both inclusive, comprise a full,

true and correct statement and transcript of such testimony and proceedings.

Dated at Fairbanks, Alaska, this 23rd day of July, 1942.

EMMA M. COOK

Before the United States Employee's
Compensation Commission.

In the Matter of the Claim for Compensation
matter of the death of William Earnest Nutt.

INTERROGATORIES AND ANSWERS OF
A. A. LYON

Deposition of A. A. Lyon, taken at his office at 307 Masonic Temple Building, Des Moines, Polk County, Iowa, at 1:15 p. m. February 12, 1944.

Taken by S. S. Wright, Certified Shorthand Reporter and Notary Public, 417 Court House, Des Moines, Iowa.

Int. 1: What is your name and address and official position with your employer on June 26, 1942 and the period thereof?

A. A. A. Lyon. Engineer and superintendent of the Lytle-Green Construction Company.

Int. 2: What is the name and address of your employer who employed you in June, 1942?

A. Lytle-Green Construction Company, 307 Masonic Temple Building.

Int. 3: Were you personally acquainted with

(Deposition of A. A. Lyon.)

William Earnest Nutt who died on or about June 26, 1942?

A. Only as an employe.

Int. 4: Who was William Earnest Nutt's employers in June, 1942 at the time of his death, and what were his wages?

A. We were his employers. He was classed as a laborer at one dollar an hour. That was our labor schedule up there last year.

Int. 5: How long had he been in the employ of his employer prior to the time of his death?

A. I don't have a complete record of the total employment. The first day on the pay roll was June 1, 1942. The last day was June 26th, the day he died, that is the record we have here now.

Int. 6: State what work he was doing on the afternoon and evening of June 26th, 1942?

A. Miscellaneous common labor from 1:00 p.m. to 4:00 p.m., June 26, 1942, laid off for the day at 4:00 p.m.

Int. 7: What time of day did he complete his work?

A. 4:00 p.m. June 26th.

Int. 8: When he was working where was he working, and was he working on a boat?

A. He had been assisting six other men load a boat at Big Delta, Alaska, between 1:00 p.m. and 4:00 p.m.

Int. 9: If he was working on a boat, what was he doing?

A. He had been assisting six other men load a

(Deposition of A. A. Lyon.)

boat at Big Delta, Alaska, between 1:00 p.m. and 4:00 p.m.

Int. 10: Who was the foreman over William Earnest Nutt at that time? Please give his name and address and present location.

A. Bill Green, the foreman, took a crew of seven men to Big Delta to load a boat. The present address of Bill Green, the foreman, is not known.

Int. 11: Where was William Earnest Nutt staying in June, 1942, that is, where did he eat and sleep?

A. At the Company camp near the Big Delta Airport in Alaska.

Int. 12: Did his employer maintain the place where he ate and slept; and if so, how far was it from the place where he was working on the afternoon of June 26, 1942?

A. Yes, the point of loading the boat over thirteen miles north of the camp.

Int. 13: What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. On a Company truck to the place where they worked.

Int. 14: State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth be-

(Deposition of A. A. Lyon.)

tween these different places; and if so, where these different places were all in June, 1942?

A. Yes, all within the area of activity in connection with the construction of the Big Delta Airport.

Int. 15: Was the place where William Earnest Nutt stayed in June, 1942 a regular camp or barracks maintained by his employer for the use of his employer's employees?

A. Yes.

Int. 16: How far from the place where William Earnest Nutt was working on the day he was killed was the place he slept?

A. Twelve or thirteen miles.

Int. 17: Was there other transportation available to William Earnest Nutt to take him from his place of work to the place where the company maintained a camp for him to stay? This question relates to or about the time of William Earnest Nutt's death in June, 1942.

A. I don't know.

Int. 18: If other transportation was available, what was this transportation and how was it available?

A. Also unknown.

Int. 19: Did you as an employee of your employer, who was likewise William Earnest Nutt's employer, have any charge over him on the day he was killed in June, 1942?

A. No, I was not on the job.

Int. 20: Were you the foreman over him at the

(Deposition of A. A. Lyon.)

time he was working in the afternoon of June 26, 1942?

A. No.

Int. 21: What, if anything, did you tell him on the afternoon or evening of his death in reference to riding back to the Company's camp in a Company truck?

A. Nothing.

Int. 22: State if you know who the owner of the truck was in which truck William Earnest Nutt was riding at the time of his death.

A. A truck owned by the company.

Int. 23: State if you know who was the employer of the other men who were riding in the truck at the time William Earnest Nutt was killed.

A. Our Company.

Int. 24: When did you first learn of the death of William Earnest Nutt?

A. Late in the evening of the same day by telephone.

Int. 25: Was William Earnest Nutt's death generally known among the employees of his employer within the next day or so after his death?

A. I presume so.

Int. 26: When and how did you communicate the news of William Earnest Nutt's death to your superiors?

A. The matter was taken care of by those on the job.

Int. 27: Did you attend the coroner's inquest on

(Deposition of A. A. Lyon.)

the death of William Earnest Nutt before Honorable William N. Growden on June 29, 1942?

A. No.

Int. 28: State if you know who the insurance carrier for William Earnest Nutt's employer was carrying insurance against liability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. State whether this insurance carrier was United States Fidelity and Guaranty Company.

A. I don't know.

Int. 29: State generally what if anything you know about the death of William Earnest Nutt, his employment at or shortly prior to his death including the afternoon before his death, and anything further which you deem of importance in reference to his employment or death which has not been asked you in prior interrogatories.

A. I don't know about that. I wasn't around there. All I have is hearsay.

Cross-Interrogatories

Int. 1: State in detail what the duties of the deceased, William Earnest Nutt, were as an employee of C. F. Lytle Company and Green Construction Company.

A. Miscellaneous laborer in connection with the airport construction in territory of Alaska.

Int. 2: What were his working hours and where was he assigned to work on the day on which he met his death?

A. Working hours ordinarily from 7:00 to 6:00,

(Deposition of A. A. Lyon.)

but on the day of his death I understand that due to weather conditions he worked only from 1:00 p.m. to 4:00 p.m. assisting in loading a boat on the river about twelve or thirteen miles north of the camp.

Int. 3: When had he completed his work on the day of his death?

A. 4:00 p.m.

Int. 4: At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. Their work was completed at 4:00 p.m.

Int. 5. State if you know on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt?

A. 4:00 p.m. of that day, and the other men with the exception of the deceased and two others, returned to their quarters.

Int. 6: When and how did the crew leave their place of work on this day?

A. I presume on the truck they used to go to the job.

Int. 7: Did the deceased leave with them on this day?

A. Apparently not, I don't know.

Int. 8: If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A. I don't know.

Int. 9: Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose?

(Deposition of A. A. Lyon.)

A. According to reports, he didn't return on the truck provided.

Int. 10: If the answer to the above is "No," please state when the deceased did return or attempt to return from the vicinity where he was working.

A. According to our job report he left for camp about 10:30 p.m.

Int. 11: If he returned via truck, by whom and for what purpose was the truck on which he was riding being operated at the time of his death?

A. The truck reportedly was operated by Otto Berg, a Company employee, sent to Big Delta during the evening on Company business.

Int. 12: Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. For the purpose of the employer, I presume.

Int. 13: State if you know whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of C. F. Lytle Company and Green Construction Company.

A. According to our job reports, Otto Berg, the driver of the truck was the only man on Company business.

Int. 14: State if you know what the deceased had been doing immediately prior to getting on the truck from which he met his death.

A. Witnesses say that the deceased had been drinking just prior to getting on the truck.

(Deposition of A. A. Lyon.)

Int. 15: State, if you know, whether or not the deceased was intoxicated at the time of his death?

A. I don't know.

Int. 16: State if you know if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift.

A. Yes, occasionally, if in charge of a responsible driver.

CERTIFICATE

State of Iowa,
Polk County—ss.

I, S. S. Wright, a Certified Shorthand Reporter in and for the State of Iowa, and a Notary Public in and for Polk County, Iowa, hereby certify that on Saturday, February 12, 1944, at 1:15 p.m., at the office of A. A. Lyon, at 307 Masonic Temple Building, Des Moines, Polk County, Iowa, I took in shorthand the answers to the interrogatories and cross-interrogatories hereto attached, and I further certify that I have transcribed said answers into longhand as above set out, and hereby certify that the foregoing transcript is a full, true and complete transcript of said interrogatories and answers as the same were taken by me in shorthand, and that the said transcript above set out contains all the pro-

ceedings had at said time and place. Witness my hand this 19th day of February, 1944.

(Seal)

S. S. WRIGHT,

Notary Public in and for Polk County, Iowa.

[Printer's Note: Attached hereto are the interrogatories and cross-interrogatories which are duplicated in the foregoing deposition.]

Before the United States Employees' Compensation
Commission

In the Matter of the Claim for Compensation in the
death of William Earnest Nutt.

INTERROGATORIES PROPOUNDED TO AND
ANSWERS OF WILLIAM H. GREEN

Deposition of William H. Green, Sioux City, Iowa, taken at Sioux City, Woodbury County, Iowa, on Wednesday, March 1, 1944, in answer to written interrogatories, before Jarvis Campbell, Notary Public in and for Woodbury County, Iowa, and also a Certified Shorthand Reporter, 301 Court House, Sioux City, Iowa.

William H. Green, of Sioux City, Iowa, being first duly sworn, testified as follows in answer to the written interrogatories propounded to him as hereinafter set out, at Sioux City, Iowa, on Wednesday, March 1, 1944:

(Deposition of William H. Green.)

Direct Interrogatories

Int. 1: What is your name and address and official position with your employer, on June 26, 1942 and the period thereabouts?

A. My name is William H. Green and I live at 1010 Twenty-eighth Street, Sioux City, Iowa. I was foreman for C. F. Lytle Company and Green Construction Company, and had charge of electrical wiring.

Int. 2: What is the name and address of your employer who employed you in June, 1942?

A. C. F. Lytle Company and Green Construction Company, Des Moines, Iowa.

Int. 3: Were you personally acquainted with William Earnest Nutt who died on or about June 26, 1942?

A. No, I was not personally acquainted with him. I knew who he was and knew he was working on this job.

Int. 4: Who was William Earnest Nutt's employers in June, 1942 at the time of his death, and what were his wages?

A. He was employed on the Big Delta air base job by C. F. Lytle Company and Green Construction Company, I do not know what his wages were.

Int. 5: How long had he been in the employ of his employer prior to the time of his death?

A. I don't know.

Int. 6: State what work he was doing on the afternoon and evening of June 26th, 1942?

A. Well, that afternoon we were loading ma-

(Deposition of William H. Green.)

terial on a small boat to be shipped up the river and he was a member of the crew engaged in this work.

Int. 7: What time of day did he complete his work?

A. I would say it was late in the afternoon. I cannot give a more definite time as I cannot remember.

Int. 8: When he was working where was he working, and was he working on a boat?

A. He was working at loading material on a boat. The place where he was working would be at the Big Delta River bank.

Int. 9: If he was working on a boat, what was he doing?

A. Well, he was loading material on the boat along with the other men.

Int. 10: Who was the foreman over William Earnest Nutt at that time? Please give his name and address and present location.

A. I was the foreman over him on that particular day. My present address is 1010 Twenty-eighth Street, Sioux City, Iowa, and I am presently located and working in Sioux City, Iowa.

Int. 11: Where was William Earnest Nutt staying in June, 1942, that is, where did he eat and sleep?

A. Well, Lytle and Green had barracks at this Big Delta air base and he was eating and sleeping there.

Int. 12: Did his employer maintain the place where he ate and slept; and if so, how far was it

(Deposition of William H. Green.)

from the place where he was working on the afternoon of June 26, 1942?

A. His employer did maintain the place where he ate and slept. This was about 10 miles from the place where he was working on the afternoon of June 26, 1942; however, I am not certain as to the exact distance.

Int. 13: What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. The company had trucks that were used to carry material on the construction job and the workers would ride to and from work on these trucks.

Int. 14: State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth between these different places; and if so, where these different places were all in June, 1942?

A. The company did provide a place for him to work and a place for him to stay and for him to eat and provided transportation on their trucks back and forth between the different places where the men would be working. In June 1942 we were working at the Big Delta air base and he was staying at Big Delta air base; we had barracks right there and a cook and mess hall.

Int. 15: Was the place where William Earnest Nutt stayed in June, 1942 a regular camp or bar-

(Deposition of William H. Green.)

racks maintained by his employer for the use of his employer's employees?

A. Yes, that is right, it was a regular place for the use of the employees.

Int. 16: How far from the place where William Earnest Nutt was working on the day he was killed was the place he slept?

A. I would say it was about 10 miles but I don't know exactly.

Int. 17: Was there other transportation available to William Earnest Nutt to take him from his place of work to the place where the company maintained a camp for him to stay? This question relates to or about the time of William Earnest Nutt's death in June, 1942.

A. There was no other transportation that I know of except the trucks going up and down the highway.

Int. 18: If other transportation was available, what was this transportation and how was it available?

A. The transportation available would be the Lytle and Green trucks going up and down the highway, they were hauling these supplies up and down the highway. You see, their trucks were going up and down the highway all the time, day and night, back and forth from clear down from Veldeze to Fairbanks.

Int. 19: Did you as an employee of your employer, who was likewise William Earnest Nutt's

(Deposition of William H. Green.)

employer, have any charge over him on the day he was killed in June, 1942?

A. He was working on the crew that afternoon that I was in charge of as foreman.

Int. 20: Were you the foreman over him at the time he was working in the afternoon of June 26, 1942? A. Yes.

Int. 21: What, if anything, did you tell him on the afternoon or evening of his death in reference to riding back to the Company's camp in a Company truck?

A. I did not tell him anything in reference to riding back to the company's camp in a company truck.

Int. 22: State if you know who the owner of the truck was in which truck William Earnest Nutt was riding at the time of his death.

A. I do not know.

Int. 23: State if you know who was the employer of the other men who were riding in the truck at the time William Earnest Nutt was killed.

A. I do not know. I don't know anything about who was riding in the truck at the time he was killed.

Int. 24: When did you first learn of the death of William Earnest Nutt?

A. Well, I heard about that later on that same evening after supper.

Int. 25: Was William Earnest Nutt's death generally known among the employees of his employer within the next day or so after his death?

A. Yes, they all knew about it the next day.

(Deposition of William H. Green.)

Int. 26: When and how did you communicate the news of William Earnest Nutt's death to your superiors?

A. I did not communicate the news of his death to my superiors.

Int. 27: Did you attend the coroner's inquest on the death of William Earnest Nutt before Honorable William N. Growden on June 29, 1942?

A. No, I did not.

Int. 28: State if you know who the insurance carrier for William Earnest Nutt's employer was carrying insurance against liability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. State whether this insurance carrier was United States Fidelity and Guaranty Company.

A. I don't know a thing about who their insurance was with.

Int. 29: State generally what if anything you know about the death of William Earnest Nutt, his employment at or shortly prior to his death including the afternoon before his death, and anything further which you deem of importance in reference to his employment or death which has not been asked you in prior interrogatories.

A. I don't know anything about the death of Nutt. I don't know anything about his work except that on this particular day he was one of the men sent up there to load this boat and I was in charge of the crew. There is nothing further that I have to add.

(Deposition of William H. Green.)

Cross-Interrogatories

Int. 1: State in detail what the duties of the deceased, William Earnest Nutt, were as an employee of C. F. Lytle Company and Green Construction Company.

A. I don't know what his duties were except that on this particular day he was working on the crew that I was in charge of; he was not regularly working under me and I don't know what his duties were; he was just assigned to the crew on this day to load this boat with material; we were loading electrical material and he was sent up to help load the boat; the company ordered me to see that this electrical material got on its way and sent this crew to do the loading.

Int. 2: What were his working hours and where was he assigned to work on the day on which he met his death?

A. I don't know what his working hours were. He was assigned up to this Big Delta River bank to load this boat.

Int. 3: When had he completed his work on the day of his death?

A. Well, it was late that afternoon when he completed his work; I do not know the exact time.

Int. 4: At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. On this particular day this crew of men had been assigned to load the boat and finish the job, which was completed late that afternoon. This was

(Deposition of William H. Green.)

not a crew that I regularly had charge of and I do not know their hours, except that we were to finish loading this boat before quitting for the day.

Int. 5: State, if you know, on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt.

A. We finished late that afternoon but I do not remember the exact time we finished.

Int. 6: When and how did the crew leave their place of work on this day?

A. The crew left in the company trucks after finishing the work, but I cannot remember what time it was except that it was late in the afternoon.

Int. 7: Did the deceased leave with them on this day?

A. He did not leave on the truck that I was riding on and I do not personally know how he went back to camp.

Int. 8: If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A. I do not know.

Int. 9: Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose?

A. I do not know.

Int. 10: If the answer to the above is "no", please state when the deceased did return or attempt to return from the vicinity where he was working.

A. I do not know.

Int. 11: If he returned via truck, by whom and

(Deposition of William H. Green.)

for what purpose was the truck on which he was riding being operated at the time of his death?

A. I do not know, I can't answer this question.

Int. 12: Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. I do not know.

Int. 13: State, if you know, whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of C. F. Lytle Company and Green Construction Company.

A. I do not know.

Int. 14: State, if you know, what the deceased had been doing immediately prior to getting on the truck from which he met his death.

A. I do not know.

Int. 15: State, if you know, whether or not the deceased was intoxicated at the time of his death.

A. I do not know.

Int. 16: State, if you know, if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift.

A. They provided transportation at all times in the company trucks; the men would ride in the company trucks back and forth at all times.

WILLIAM H. GREEN

Subscribed in my presence and sworn to before me this 7th day of March, 1944.

(Seal)

JARVIS CAMPBELL,

Notary Public in and for Woodbury County, Iowa.

My commission expires July 4, 1945.

CERTIFICATE

State of Iowa,

Woodbury County—ss.

I, Jarvis Campbell, Notary Public in and for Woodbury County, Iowa, and also a Certified Shorthand Reporter in and for the State of Iowa, hereby certify that on Wednesday, March 1, 1944, at Sioux City, Woodbury County, Iowa, William H. Green, of Sioux City, Iowa, appeared before me for the purpose of answering the above and foregoing written interrogatories; that before giving his answers as above set forth he was by me first duly sworn to tell the truth, the whole truth and nothing but the truth; that said written interrogatories were propounded to the said William H. Green by me and that I took down in shorthand his answers thereto; that I have transcribed said answers into typewriting as above set out, and that the above and foregoing answers as herein set out are the answers given by the said William H. Green at the said time; that on March 7, 1944, the said William H. Green, after reading the said written interrogatories and his answers given thereto, subscribed his name at the end thereof as set out and shown on page 11 hereof.

Witness my hand this 7th day of March, 1944.

(Seal) JARVIS CAMPBELL,
Notary Public in and for Woodbury County, Iowa.

My commission expires July 4, 1945.

Before the United States Employee's Compensation
Commission

In the Matter of the Claim for Compensation in
the Death of William Earnest Nutt.

INTERROGATORIES AND ANSWERS OF
RALPH GREEN

Deposition of Mr. Ralph Green, taken at his office at 317 Masonic Temple Building, Des Moines, Polk County, Iowa, at 10 a. m. on Saturday, February 12, 1944.

Taken by S. S. Wright, Certified Shorthand Reporter and Notary Public, 417 Court House, Des Moines, Iowa.

Int. 1. What is your name and address and official position with your employer, on June 26, 1942 and the period thereabouts?

A. Ralph Green. I own the Green Construction Company and act as attorney in fact for the C. F. Lytle Company, acting as general manager for the co-partnership.

Int. 2. What is the name and address of your employer who employed you in June, 1942?

A. Well, I am self-employed.

Int. 3. Were you personally acquainted with William Earnest Nutt who died on or about June 26, 1942? A. No, I was not.

Int. 4. Who was William Earnest Nutt's employer in June, 1942, at the time of his death and what were his wages?

A. Well, it would be C. F. Lytle Company and

(Deposition of Ralph Green.)

Greene Construction Company were the employers. I cannot tell you what his wage was. I really don't know. Whatever his wage classification was is what it would be. I think Mr. Lyons can give you that information, I am quite sure.

Int. 5. How long had he been in the employ of his employer prior to the time of his death?

A. I cannot answer that.

Int. 6. State what work he was doing on the afternoon and evening of June 26, 1942?

A. I cannot tell you that.

Int. 7. What time of day did he complete his work?

A. That is beyond me too, I do not know the circumstances regarding it at all.

Int. 8. When he was working where was he working, and was he working on a boat?

A. Well, I don't know, he was working on a job at Big Delta which was the airport in Alaska. I don't know what his particular duties might have been at that time.

Int. 9. If he was working on a boat, what was he doing?

A. I wouldn't know.

Int. 10. Who was the foreman over William Earnest Nutt at that time? Please give his name and address and present location.

A. Al Lyons was the general superintendent. I don't know who his particular foreman might have been.

Int. 11. Where was William Earnest Nutt stay-

(Deposition of Ralph Green.)

ing in June, 1942 that is, where did he eat and sleep?

A. Well, I assume that he stayed with the rest of the men at the camp at the job.

Int. 12. Did his employer maintain the place where he ate and slept, and if so, how far was it from the place where he was working on the afternoon of June 26, 1942?

A. Well, we maintain the place that they do eat and sleep, but I don't know where he might have been working on that particular day. The living and eating quarters was at the side of the work on the main job. He might have been on some special assignment, I don't know about that.

Int. 13. What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. I cannot tell you that, I don't know what arrangements they had.

Int. 14. State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth between these different places; and if so, where these different places were all in June, 1942?

A. Generally speaking, his work was at the location of the camp, and there was transportation necessary other than the ability to walk to the

(Deposition of Ralph Green.)

work. I don't know what this particular case might have been.

Int. 15. Was the place where William Earnest Nutt stayed in June, 1942, a regular camp or barracks maintained by his employer for the use of his employer's employees? A. That is right.

Int. 16. How far from the place where William Earnest Nutt was working on the day he was killed was the place where he slept?

A. I could not tell you that, I don't know what his particular duties were on that particular day.

Int. 17. Was there other transportation available to William Earnest Nutt to take him from his place of work to the place where the company maintained a camp for him to stay? This question relates to or about the time of William Earnest Nutt's death in June, 1942.

A. I cannot answer that.

Int. 18. If other transportation was available, what was this transportation, and how was it available? A. I cannot answer that.

Int. 19. Did you, as an employee of your employer, who was likewise William Earnest Nutt's employer, have any charge over him on the day he was killed in June, 1942?

A. I don't know what the arrangements might have been on that particular day.

Int. 20. Were you the foreman over him at the time he was working in the afternoon of June 26, 1942? A. No.

Int. 21. What, if anything, did you tell him

(Deposition of Ralph Green.)

on the afternoon or evening of his death in reference to riding back to the company's camp in a company truck?

A. I told him nothing, I was not at the job site at all.

Int. 22. State if you know who the owner of the truck was in which truck William Earnest Nutt was riding at the time of his death.

A. I understood it was our truck, but I am not positive about that even.

Int. 23. State if you know who was the employer of the other men who were riding in the truck at the time William Earnest Nutt was killed?

A. I don't know who the other men were.

Int. 24. When did you first learn of the death of William Earnest Nutt?

A. I cannot answer on that positively, and I am not sure what date they informed me of.

Int. 25. Was William Earnest Nutt's death generally known among the employees of his employer within the next day or so after his death?

A. I think it was known immediately.

Int. 26. When and how did you communicate the news of William Earnest Nutt's death to your superiors?

A. Well, I have no superiors. I think Mr. Lyons informed me of his death.

Int. 27. Did you attend the coroner's inquest on the death of William Earnest Nutt before Honorable William N. Growden on June 27, 1942?

A. No.

(Deposition of Ralph Green.)

Int. 28. State, if you know, who the insurance carrier for William Earnest Nutt's employer was carrying insurance against liability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. State whether this insurance carried was United States Fidelity and Guaranty Company.

A. Yes, I am sure it was the United States Fidelity and Guaranty Company.

Int. 29. State generally what, if anything, you know about the death of William Earnest Nutt, his employment at or shortly prior to his death including the afternoon before his death, and anything further which you deem of importance in reference to his employment or death which has not been asked you in prior interrogatories?

A. I do not know that I can add anything to that, I am not familiar enough with the case to know the particulars.

Cross-Interrogatories

Int. 1. State in detail what the duties of the deceased, William Earnest Nutt were as an employee of the C. F. Lytle Company and Green Construction Company.

A. I was not present on this job at the time of this man's death and I am not familiar enough with it to know the details.

Int. 2. What were his working hours and where

(Deposition of Ralph Green.)

was he assigned to work on the day on which he met his death? A. I don't know.

Int. 3. When had he completed his work on the day of his death?

A. I cannot answer that.

Int. 4. At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. I cannot answer that.

Int. 5. State, if you know, on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt?

A. I don't know that.

Int. 6. When and how did the crew leave their place of work on this day?

A. I cannot answer that.

Int. 7. Did the deceased leave with them on this day? A. I don't know.

Int. 8. If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A. I don't know.

Int. 9. Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose?

A. I don't know.

Int. 10. If the answer to the above is "No," please state when the deceased did return or attempt to return from the vicinity where he was working? A. I don't know that.

(Deposition of Ralph Green.)

Int. 11. If he returned via truck, by whom and for what purpose was the truck on which he was riding being operated at the time of his death?

A. I don't know that.

Int. 12. Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. I cannot answer that.

Int. 13. State, if you know, whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of C. F. Lytle Company and Green Construction Company.

A. I don't know that.

Int. 14. State, if you know, what the deceased had been doing immediately prior to getting on the truck from which he met his death?

A. I don't know that.

Int. 15. State, if you know, whether or not the deceased was intoxicated at the time of his death?

A. I don't know that.

Int. 16. State, if you know, if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift?

A. I don't know what the particular arrangements were on this job.

CERTIFICATE

State of Iowa,

Polk County—ss.

I, S. S. Wright, a Certified Shorthand Reporter in and for the State of Iowa, and a Notary Public in and for Polk County, Iowa, hereby certify that on Saturday, February 12, 1944, at 10 a. m. at the office of Ralph Green, at 317 Masonic Temple Building, Des Moines, Polk County, Iowa, I took in shorthand the answers to the interrogatories and cross-interrogatories hereto attached, and I further certify that I have transcribed said answers into long-hand as above set out, and hereby certify that the foregoing transcript is a full, true and complete transcript of said interrogatories and answers as the same were taken by me in shorthand, and that the said transcript above set out contains all the proceedings had at said time and place. Witness my hand this 19th day of February, 1944.

[Seal]

S. S. WRIGHT,

Notary Public in and for Polk County, Iowa.

Before the United States Employees' Compensation
Commission

In the Matter of the Claim for Compensation in
the Death of William Earnest Nutt.

INTERROGATORIES TO BE PROPOUNDED
TO ROBERT L. NINE

Mr. Robert L. Nine, being called as a witness on
behalf of the heirs of William Earnest Nutt, de-

(Deposition of Robert L. Nine.)

ceased, and Clark Nutt, and after being first duly sworn before the officer hereinafter named and described as authorized by law to administer oath, makes the following answers to the interrogatories and cross-interrogatories hereinafter set out.

Int. 1. What is your name, age and present address and residence?

A. Robert L. Nine, 32 years, Box 1130, Fairbanks, Alaska, residing at Big Delta, Alaska.

Int. 2. Who is your president employer and who employed you in June, 1942?

A. Lytle & Green Construction Co. now and in June, 1942.

Int. 3. Were you personally acquainted with William Earnest Nutt who died on or about June 26, 1942? A. Yes.

Int. 4. How long had you known William Earnest Nutt, and were you in any way related to him or his family?

A. About 15 years. I was not related to him or his family.

Int. 5. State, if you know, who employed William Earnest Nutt in June, 1942 and who his employers were on June 25th and 26th, 1942.

A. Lytle & Green Construction Co.—to both parts of question.

Int. 6. Were you working with William Earnest Nutt on the afternoon of June 26, 1942 or on the date he was killed. A. Yes.

Int. 7. If so, was he employed with you on the

(Deposition of Robert L. Nine.)

same job and by the same employer, and if so, who was that employer? A. Yes. Same employer.

Int. 8. What job were you working on, on the afternoon of the day he was killed, and where was this work being carried on and who was all working there with William Earnest Nutt?

A. We were loading electrical equipment on a barge on the Tanana River at Big Delta. Ray Johnson, and Jack Johnson, and Foreman Bill Green. There were three others but I do not remember their names.

Int. 9. State, if you know, who the foreman over William Earnest Nutt and yourself was on the afternoon before William Earnest Nutt was killed.

A. William B. Green.

Int. 10. What work was your employer doing in June, 1942, that you and William Earnest Nutt were working on?

A. Building airport at Big Delta, Alaska; we were working on paving, but on this day, loading electrical equipment on barge.

Int. 11. Did the company maintain a camp for its employees including William Earnest Nutt, and if so, where was that camp in reference to the place where you were working on the afternoon of the day William Earnest Nutt was killed?

A. Yes. It was about eleven (11) miles from where we were working on the day Wm. E. Nutt was killed.

Int. 12. Did the company maintain this camp

(Deposition of Robert L. Nine.)

for its employees, including William Earnest Nutt?
State if you know. A. Yes.

Int. 13. Did the employees sleep there and did they eat there? A. Yes.

Int. 14. Did the company furnish transportation from the camp to the place where its work was being done by you and William Earnest Nutt and the other employees, and if so, what type of transportation and what method of transportation was furnished by company? A. Yes, by truck.

Int. 15. On the day William Earnest Nutt was killed, did you go to the place of work where he was working with him, and if so, about what time of day did you go and what method of transportation did you use?

A. Yes, I went with him. We left the camp at 1:00 P. M. by truck.

Int. 16. Did one of your employer's trucks transport you from the camp to the place where that work was done that William Earnest Nutt and you and the others were doing on the afternoon of the day he was killed? A. Yes.

Int. 17. What kind of a day was it in reference to weather and what kind of a road was there between the camp and the place where you and William Earnest Nutt and the others were working?

A. Rainy day nad the road was rough.

Int. 18. What were you and William Earnest Nutt and the others with you working at for your employer on the afternoon of the day William Earnest Nutt was killed?

(Deposition of Robert L. Nine.)

A. We were loading electrical equipment on a barge.

Int. 19. How long did you and William Earnest Nutt work that afternoon or that day?

A. That afternoon we worked about five (5) hours.

Int. 20. What did you and William Earnest Nutt and the others do after your work was completed, and where did you go?

A. It was raining and we got wet so we went to Rika Wallen's roadhouse to dry out.

Int. 21. If you went to Rika's roadhouse, where was that in referenec to the place where you and William Earnest Nutt were working, and did William Earnest Nutt also go to the same place.

A. Rika's roadhouse was about 500 feet from where we were working. Mr. Nutt also went there.

Int. 22. About what time of day did you go to that place? A. About 6:00 P. M.

Int. 23. State, if you know, whether or not the foreman over William Earnest Nutt and yourself, Mr. W. B. Green, was an employee of the same employer employing you and William Earnest Nutt on that afternoon, and also state, if you know, what the name of that employer was.

A. Yes, employer of all was Lytle & Green Const. Co.

Int. 24. State, if you know, whether William Earnest Nutt was instructed by W. B. Green as to how he was to return to the camp, and state whether there was any conversation in your pres-

(Deposition of Robert L. Nine.)

ence in reference to returning to the camp between W. B. Green and William Earnest Nutt or any others, and state what that conversation was.

A. Yes. There were two trucks and Mr. Green told the ones that wanted to go on the first truck to do so, or take the second truck later. I did not hear any direct conversation between Mr. Green & Mr. Nutt. Mr. Green addressed the group of employees as a whole and left it up to us as to which truck to take back to camp.

Int. 25. Did you remain at the roadhouse, or did you return with the first truck, and if you did return with the first truck, about what time did you return to the camp?

A. I returned with first truck. Returned to camp about 7:00 P. M.

Int. 26. State if you know, whether the roadhouse sold hard liquor, and state what, if anything, you know about what beverages were available to people in the roadhouse.

A. The roadhouse sold no hard liquor, but beer was available.

Int. 27. State, if you know, whether William Earnest Nutt was drinking on the evening of the day he was killed, and if so, state, if you know, what he was drinking.

A. To my knowledge Mr. Nutt was not drinking, at least while I was there.

Int. 28. State, if you know, whether William Earnest Nutt was riding in a truck belonging to

(Deposition of Robert L. Nine.)

your employer and his employer at the time he was killed.

A. William Earnest Nutt was riding in a truck belonging to my employer and his at the time he was killed.

Int. 29. State, if you know, who was riding in the same truck at the time William Earnest Nutt was killed.

A. Jack Johnson, Ray Johnson, Otto Berg and another boy by the name of Walter something, do not recall his last name.

Int. 30. State, if you know, where William Earnest Nutt was killed and state, if you know, where in reference to the camp the spot was that William Earnest Nutt was killed.

A. Yes, I know Mr. Nutt was killed about five miles between Big Delta and the camp site.

Int. 31. Did you see the spot where William Earnest Nutt was killed shortly after he was killed, and if so, how soon after and when?

A. I saw the spot about five hours after Mr. Nutt was killed.

Int. 32. Describe, if you can, the truck William Earnest Nutt was riding in at the time he was killed.

A. It was 1937 V8 with a yard and a half dump box on it.

Int. 33. Tell who the owner of the truck was that William Earnest Nutt was riding in at the time he was killed, and tell who the employer was

(Deposition of Robert L. Nine.)

of the other persons riding in the truck with William Earnest Nutt.

A. Lytle & Green Const. Co. was the owner of the truck and also the employer of the other persons riding in the truck with Wm. E. Nutt.

Int. 34. State, if you know, whether the spot where William Earnest Nutt was killed was on a straight-a-way or on a curve or near a curve, and which direction from the curve that spot was in reference to the curve, and approximately how far said spot was from the roadhouse.

A. It was just coming out of a curve approximately five miles from the roadhouse and 500 feet from the curve to where he was killed, approximately.

Int. 35. State, if you can, whether the road at the point where the accident occurred was rough or smooth or rutty, or what the condition of the road was, and whether the road was wet or dry at the time.

A. Road was wet and rutty at the time of the accident.

Int. 36. Are you acquainted with the family of William Earnest Nutt, and if so, how long have you been acquainted with the family of William Earnest Nutt?

A. Yes, about 15 years.

Int. 37. Are you acquainted with Phyliss Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, and state, if you know, whether they are the minor children of William Earnest Nutt?

(Deposition of Robert L. Nine.)

A. Yes, they are the minor children of Wm. Earnest Nutt and I am acquainted with them.

Int. 38. State, if you know, whether the approximate ages of the children are as follows: Phyliss Elaine Nutt, 13; Kenneth James Nutt, 15; and Raymond Albert Nutt, 17. A. Yes.

Int. 39. Are you personally acquainted with Clark Nutt. A. Yes.

Int. 40. What is his name and address and his relationship to William Earnest Nutt?

A. His name is Clark Nutt, Indianola, Iowa, and he is a brother of William Earnest Nutt.

Int. 41. Have you examined the court records in Warren County, Iowa, in reference to the appointment of Clark Nutt as guardian for Phyliss Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, and if so, state whether or not those court records disclosed that he has been appointed guardian for those minor children of William Earnest Nutt?

A. Yes, I have examined the court records in Warren County, Iowa, and Clark Nutt has been appointed guardian of the above named minor children of Wm. E. Nutt.

Int. 42. Are you in any way related to Clark Nutt or his wife, or members of his family?

A. No.

Int. 43. How long have you known Clark Nutt?

A. About 15 years, more or less.

Int. 44. After the death of William Earnest Nutt, did you do anything in reference to arrang-

(Deposition of Robert L. Nine.)

ing for the transportation of his body back to Indianola, Iowa, and if so, with whom did you communicate?

A. Yes, I communicated with Clark Nutt and arranged for the transportation of the body to Indianola, Iowa.

Int. 45. State, if you know, whether Clark Nutt paid any or all of the transportation and embalming expenses and funeral expenses of William Earnest Nutt, and state how you know what you do know.

A. Clark Nutt paid all transportation, embalming and funeral expenses of William Earnest Nutt and I know that because Clark Nutt wired money covering all these expenses to local Tye funeral Home at my request.

Int. 46. State, if you can, the approximate amount paid by Clark Nutt for transportation of the body and embalming and funeral expenses of William Earnest Nutt.

A. I believe it was approximately \$750.00.

Int. 47. State, if you know, whether there was a coroner's hearing over the death of William Earnest Nutt, and if so, state whether any of your employers' employees were present at that hearing.

A. Yes, there was a coroner's hearing, and there were several of my employer's employees present at that hearing.

Int. 48. State when and where that hearing occurred and what the nature of the hearing was.

A. The hearing occurred at Fairbanks, Alaska,

(Deposition of Robert L. Nine.)

before U. S. Commissioner Wm. N. Crowden, about July 1st, 1942.

Int. 49. State whether or not the fact of William Earnest Nutt's death and the circumstances thereof were common knowledge among the employees of your employer and William Earnest Nutt's employer shortly after his death.

A. Yes, the death and circumstances were common knowledge among employees.

Int. 50. Name some of the employees, if you can, of your employer and William Earnest Nutt's employer whom you heard discuss this matter and about the date that you heard that discussion.

A. Al Lyons and Ralph Green, about June 27th, 1942.

Int. 51. Did you discuss the death of William Earnest Nutt with any of the employees or officers or foreman of your employer and William Earnest Nutt's employer shortly after the death of William Earnest Nutt, and if so, that with whom you discussed it and when you discussed it.

A. Yes, I discussed the death the next morning with Ralph Green and Al Lyons.

Int. 52. If you did discuss it with any of the employees, state whether any of them told you that it had been reported to your employer and William Earnest Nutt's employer, and if so, when and where this conversation occurred.

A. Al Lyons, general superintendent, told me that the death had been reported. Conversation occurred in the office at camp, June 27th, 1942.

(Deposition of Robert L. Nine.)

Int. 53. Are you in any manner interested financially, or otherwise in a claim in connection with the death of William Earnest Nutt, and specifically in connection with the claim filed in this court over the death of William Earnest Nutt? A. No.

Int. 54. State, if you know, whether there was any other method of transportation back from the place of work to the camp available to the employees of your employer and William Earnest Nutt's employer on the date that William Earnest Nutt's death occurred, and if so, state what that transportation was.

A. No other transportation to the camp that I know of.

Int. 55. State, if you know, what William Earnest Nutt was making at the time, or about the time, he was killed. In your answer state how he was paid and whether his pay that you are testifying about was solely pay from his employer and what the name of that employer was. State how you know what his pay was and what the rate of pay was.

A. Wm. E. Nutt was making about \$100.00 per week, paid by check by Lytle & Green Construction Co. Rate of pay was \$1.00 per hour.

Int. 56. State, if you know, who the insurance carrier was for liability, in connection with this matter, for your employer.

A. United States Fidelity and Guaranty Company, was insurance carrier for employer.

Int. 57. State anything further which you know in reference to the circumstances of William Earn-

(Deposition of Robert L. Nine.)

est Nutt's employment his wages, the work which he was doing on the date he was killed, the employment conditions, the place where the camp was located, the road, and any other matters which occur to you that are pertinent to the claim before the commissioner.

A. The truck on which Mr. Nutt was riding at the time of the accident was a dump truck with the sides of the box about 12 inches high. It is my opinion that as the truck rounded the curve, it hit a chuck hole and Mr. Nutt was knocked to the ground.

Cross-Interrogatories

Submitted by United States Fidelity and Guaranty Co. and C. E. Lytle Company and Green Construction Co.

Int. 1. State in detail what the duties of the deceased, William Earnest Nutt were as an employee of the C. F. Lytle Company and Green Construction Company.

A. Employed as a laborer for the Company

Int. 2. What were his working hours and where was he assigned to work on the day on which he met his death?

A. His working hours were from ten to fifteen hours per day. On the day of his death he was assigned to work at Big Delta, on the Tannana River on loading a barge.

Int. 3. When had he completed his work on the day of his death?

A. Around six o'clock in the evening.

(Deposition of Robert L. Nine.)

Int. 4. At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. They worked until their job was completed.

Int. 5. State, if you know, on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt?

A. Approximately six o'clock.

Int. 6. When and how did the crew leave their place of work on this day?

A. Part of the crew left at once as it was raining. The balance of crew went to Reka's Road House to dry their clothes. Both crews left by truck.

Int. 7. Did the deceased leave with them on this day? A. Yes, in the second truck.

Int. 8. If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A.

Int. 9. Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose? A. Yes.

Int. 10. If the answer to the above is "no" please state when the deceased did return or attempt to return from the vicinity where he was working? A.

Int. 11. If he returned via truck, by whom and for what purpose was the truck on which he was riding being operated at the time of his death?

(Deposition of Robert L. Nine.)

A. The truck was operated by Otto Berg. A company truck and Berg, as mechanic for the company, was trying it out, so the balance of crew rode home with him.

Int. 12. Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. For the purpose of the employer.

Int. 13. State, if you know, whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of the C. F. Lytle Company and Green Construction Company.

A. Yes, with the exception of one Jim Brown, who lived on the road two miles from Big Delta and nine miles from the airport. This man caught a ride home as the road lead past his door.

Int. 14. State, if you know, what the deceased had been doing immediately prior to getting on the truck from which he met his death?

A. I do not know.

Int. 15. State, if you know, whether or not the deceased was intoxicated at the time of his death?

A. In my opinion, no.

Int. 16. State, if you know, if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift? A. Yes.

(Deposition of Robert L. Nine.)

State of Iowa

Warren County—ss.

Robert Nine, being first duly sworn on oath, deposes and says that he has subscribed the answers to the foregoing interrogatories and that being first duly sworn on oath deposes and says that the answers made and subscribed thereto are true.

ROBERT L. NINE

Subscribed and sworn to before me this 25th day of Oct., 1944.

LILLIAN WALKER

Clerk, District Court in and for Warren County,
Iowa.

United States Employees' Compensation Commission, Fourteenth Compensation District

In the Matter of the Claim for Compensation Under Public Law 208, 77th Congress, Act of August 6, 1941, as Amended.

Case No. DB-14-655-11

CLARK NUTT, as legally appointed guardian of PHYLLIS ELAINE NUTT, KENNETH JAMES NUTT, and RAYMOND ALBERT NUTT, children of WILLIAM EARNEST NUTT, deceased employee,

Claimant,

vs.

C. F. LYTLE CO. and GREEN CONSTRUCTION COMPANY,

Employer,

U. S. FIDELITY & GUARANTY COMPANY,
Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 26th day of June, 1942, the claimant above named was in the employ of the employer above named at Big Delta, Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Act of August 16, 1941, as amended (42 U.S.C. sec. 1651), to employees of contractors with the United States, and others, employed outside the United States; that the liability of the employer for compensation under said Act was insured by U. S. Fidelity & Guaranty Company;

That on June 26, 1942 and previous thereto because of the location of the work the said employer provided barracks for its employees to live in and truck transportation to and from job locations that were not within walking distance; that on the said day the deceased herein was assigned to assist in the loading of electrical equipment on a barge on the Tanama River at the Big Delta River Bank, about 15 miles from the barracks; that the employer transported the deceased and several fellow employees to the job site; that the work was completed late in the afternoon and deceased and his fellow employees went to Rika's roadhouse about 500 feet from the job site; that the foreman told the employees that they could return on a truck which was leaving then or on one that would leave later; that the employer's trucks were the only means of transportation between Rika's roadhouse and the employer's bar-

racks; that deceased and other employees elected to return by the later truck; that the second truck left three to four hours after the first one; that deceased became intoxicated early in the evening; that at about 10 P.M. when the truck left he was able to get into the truck by himself; that this truck was a 1937 or 1938 V-8 1½ yard dump truck; that deceased rode in the body of the truck with Ray Johnston and Harold Johnston; that deceased was in a happy stage of intoxication; that when about four miles from the barracks and while deceased was standing in the body of the truck one of the wheels struck either a hole in the road or an obstruction, catapulting the deceased over the side of the truck; that he landed first on his feet and then slid forward about 20 feet; that neither of the rear wheels struck the deceased; that the deceased died from a broken neck almost instantly; that the death of the deceased was not occasioned solely by the intoxication of the deceased; that the death of the deceased arose out of and in the course of his employment;

That written notice of death was not given within thirty days, but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice;

That the employer did not furnish deceased with medical treatment as death was practically instantaneous;

That the average weekly wage of the deceased herein at the time of the injury exceeded \$37.50;

That the deceased employee was a widower; that

Phyllis Elaine Nutt, who was born February 13, 1930, Kenneth James Nutt, who was born February 26, 1928, and Raymond Albert Nutt, who was born December 11, 1925, are the surviving children of the deceased employee and as such are each entitled to receive death benefits at the rate of \$5.63 per week (15 per cent of \$37.50), subject to the provisions of the law; that such compensation is payable to Clark Nutt, who was legally appointed guardian of said children on June 8, 1943;

That Raymond Albert Nutt attained the age of 18 on December 11, 1943; that all death benefits to which Raymond Albert Nutt is entitled have accrued; that such death benefits amount to \$428.68 for the period June 26, 1942 to December 10, 1943, inclusive, a period of 76 1/7 weeks at the rate of \$5.63 per week;

That accrued death benefits to which Kenneth James Nutt and Phyllis Elaine Nutt are entitled amount to \$1767.82, for the period June 26, 1942, to June 28, 1945, inclusive, a period of 157 weeks at the rate of \$5.63 per week each;

That J. O. Watson, Jr., Attorney, has rendered legal services to claimant, the fair value of which is \$400.00;

That burial expenses amounted to \$691.97, which were paid by Clark Nutt; that the employer and the insurance carrier are liable to Clark Nutt in the amount of \$200.00;

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, C. F. Lytle Co. & Green Construction Co., and the insurance carrier, U. S. Fidelity & Guaranty Company, shall pay to Clark Nutt, as guardian of Raymond Albert Nutt, death benefits in behalf of said Raymond Albert Nutt at the rate of \$5.63 per week from June 26, 1942 to December 10, 1943, inclusive, a period of 76 1/7 weeks amounting to \$428.68;

That the employer, C. F. Lytle Co. & Green Construction Co., and the insurance carrier, U. S. Fidelity & Guaranty Company, shall pay to Clark Nutt, as guardian of Kenneth James Nutt and Phyllis Elaine Nutt, death benefits in behalf of said children at the rate of \$5.63 per week each, or a total of \$11.26 per week, from June 26, 1942 to June 28, 1945, inclusive, a period of 157 weeks, amounting to \$1767.82 and thereafter shall continue payments of death benefits at the rate of \$11.26 per week, payable in bi-weekly installments subject to the limitations of the law or until otherwise ordered.

That the employer, C. F. Lytle Co. & Green Construction Co., and the insurance carrier, U. S. Fidelity & Guaranty Company, shall pay to Clark Nutt in his individual capacity in reimbursement of their maximum liability for funeral expense, the amount of \$200.00.

A fee for legal services rendered the claimant in

his capacity as guardian is approved in favor of Attorney J. O. Watson in the sum of \$400.00, such amount to constitute a lien and be paid out of the award.

Given under my hand at Seattle, Washington this 3d day of July, 1945.

C. M. WHIPPLE

Deputy Commissioner,
Fourteenth Compensation
District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, and the attorney for the claimant, at the last known address of each as follows: Clark Nutt, Indianola, Iowa; C. F. Lytle Co. and Green Construction Company, Hoge Bldg., Seattle 4, Wash.; U. S. Fidelity & Guaranty Co., Central Building, Seattle 4, Wash.; J. O. Watson, Jr., 106 E. Salem Ave., Indianola, Iowa.

C. M. WHIPPLE

Deputy Commissioner

Mailed: July 3, 1945.

[Title of District Court and Cause.]

MOTION FOR PERMISSION TO INTERVENE

Comes Now Clark Nutt, through his attorney, Leo M. Koenigsberg, and respectfully moves the

court for permission to intervene in the above entitled cause upon the grounds and for the reason that he is the legally appointed guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, children of William Earnest Nutt, deceased employee for whose benefit compensation order award of compensation of the United States Employees Compensation Commission, 14th Compensation District, was issued on or about July 3, 1945, and which compensation order libellants seek to set aside.

This motion is based upon the files and records herein and the affidavit of L. M. Koenigsberg hereto attached.

LEO M. KOENIGSBERG

Attorney of Intervenor

[Endorsed]: Filed Nov. 5, 1945.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
PERMISSION TO INTERVENE

State of Washington,
County of King—ss.

L. M. Koenigsberg, being first duly sworn, upon oath deposes and says: that he has just been employed by Clark Nutt for the purposes of intervening in the above entitled cause; that Clark Nutt has employed your affiant so as to give assistance to the United States Attorney and the Assistant United

States Attorney in the preparation and defense of the above entitled cause; that your affiant received a telegram employing him on Friday, November 2, 1945, and has not had an opportunity to peruse the files and records and prepare in connection with the motion to dismiss now pending in the above entitled court; that your affiant desires, therefore, that said motion be continued to a date in the latter part of November.

L. M. KOENIGSBERG

Subscribed and sworn to before me this 5th day of November, 1945.

P. O. D. VEDOVA

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Nov. 5, 1945.

[Title of District Court and Cause.]

ORDER GRANTING PERMISSION TO
INTERVENE

This Matter came on regularly before the undersigned, one of the Judges of the above entitled court, and it appearing that Clark Nutt, guardian of the children of the deceased employee for whose benefit compensation order award of compensation was issued by the Deputy Commissioner of the United States Employees Compensation Commission, 14th Compensation District, has moved the court for permission to intervene, and the court being fully advised in the premises,

Now, therefore, it is

Ordered, Adjudged and Decreed that Clark Nutt be and is hereby granted permission to intervene in the above entitled cause.

Done in Open Court this 5th day of November, 1945.

JOHN C. BOWEN

Judge

Presented by:

LEO M. KOENIGSBERG

Attorney for Intervenor

By H. S. SANFORD

[Endorsed]: Filed Nov. 5, 1945.

In the District Court of the United States for the
Western District of Washington, Northern
Division

In Admiralty—No. 14797

C. F. LYTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation,
and UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Maryland corporation,
Libelants,

v.

C. M. WHIPPLE,

Respondent,

CLARK NUTT, Guardian of PHYLLIS ELAINE
NUTT, KENNETH JAMES NUTT and RAY-
MOND ALBERT NUTT, children of WIL-
LIAM EARNEST NUTT, Deceased,
Claimant.

ORDER GRANTING MOTION TO DISMISS

This Matter came on regularly for hearing before the undersigned, one of the Judges of the above entitled court, on Monday, November 19, 1945, at 10:30 o'clock a.m., and argument was concluded on the afternoon of the same day at or about 3:30 o'clock p.m., libellants appearing by Hayden, Merritt, Summers & Stafford, proctors for said libelants, respondent appearing by his attorney, Herbert O'Hare, Assistant United States Attorney, and claimant Clark Nutt, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased,

appearing by his attorney, Leo M. Koenigsberg, and it having been stipulated by and between the counsel for all parties that the transcript of all the testimony which was submitted to the Deputy Commissioner be considered part of the files and records in this cause, and briefs having been submitted by the libellants and the respondent, and the court having listened to argument of counsel for the libellants and for the claimant and being fully advised in the premises and motion having been made heretofore by respondent to dismiss petition for injunctive relief,

Now, therefore, it is

Ordered, Adjudged and Decreed that the motion to dismiss the libel to set aside the Deputy Commissioner's award as not being in accordance with law be and is hereby granted, and that the Deputy Commissioner's award of July 3, 1945, be and is hereby affirmed, and the libel herein is dismissed.

It Is Further Ordered, Adjudged and Decreed that legal services rendered to claimant Clark Nutt, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, by Leo M. Koenigsberg are of the reasonable value of \$200.00 and such amount to be paid out of the award herein affirmed and constitute a lien on the compensation now due or hereafter to become due to said claimant, and said libellants shall be permitted to satisfy said lien by deducting \$20.00 from each bi-weekly payment now due or hereafter to become due, making

said deductions until such time as the full sum of \$200.00 paid to Leo M. Koenigsberg has been fully satisfied.

The libellants except to all of the foregoing and the exception is hereby allowed.

Done in Open Court this 21 day of November, 1945.

JOHN C. BOWEN

Judge

Presented by:

L. M. KOENIGSBERG

Attorney for Claimant

O. K. as for form:

MERRITT, SUMMERS, BUCEY
& STAFFORD

By MATTHEW STAFFORD

Attorneys for Libelants.

Approved:

HERBERT O'HARE

Asst. U. S. Attorney

[Endorsed]: Filed Nov. 21, 1945.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 14797

C. F. LYTLE CO., et al,

Libellants,

vs.

C. M. WHIPPLE,

Respondent,

CLARK NUTT,

Intervenor.

COURT'S ORAL DECISION

(As announced from the Bench, November 19,
1945, by Judge Bowen.)

The Court: I believe that the Arkansas Court decision cited by Mr. Koenigsberg is not controlling upon the facts here for the reasons pointed out by Mr. Stafford. I am, however, mindful of the status and the function of this Court in this case, and I understand the statute and the authoritative decisions thereunder to mean that this Court cannot today try this case de novo; that the only function this Court has with respect to it is to review the action of the Deputy Commissioner, the Tribunal which did have authority to and did try the facts, to see if there is substantial evidence to support the findings and action of the Deputy Commissioner. If there is such substantial evidence, the Deputy Commissioner's action must be confirmed.

I do not hesitate to say that I feel that the Deputy Commissioner made a mistake in arriving at the decision and conclusions announced by him, but I am unable to say that as a matter of law there is no substantial evidence to support the action of the Deputy Commissioner. On the contrary, I am inclined to think there is some substantial evidence to support the Deputy Commissioner, notably the testimony of witness Berg, the truck driver, that he felt a jarring of the truck at the time of the accident, and for that reason it seems to me under the statute this Court is without authority to change the result arrived at by the Deputy Commissioner.

I repeat, however, that I think the Commissioner made a mistake. I think in view of the testimony of Ray Johnston as to what took place in respect to those things connected with the accident, that the more direct and positive proof in this case is more convincing that the decedent, while in a partially intoxicated condition and in a spirit of playfulness or bravado or acting under alcoholic stimulant, stepped out of that truck, himself, and that he was not thrown out of the truck by any jarring of the truck caused by rough roads. That is what I think about it, but I assume from the statute that my thought in the matter is of no concern in view of the fact that this Court cannot hold as a matter of law that there is no substantial evidence to support the Deputy Commissioner's action.

In view of the foregoing, the action of the Deputy Commissioner will have to be confirmed, and all requests of the employer and the insurance carrier

contrary to such action are denied. It is the opinion of the Court that the motion to dismiss the libel of the employer and insurance carrier must be granted.

(Discussion as to the Attorney's fee.)

Concluded.

[Endorsed]: Filed Nov. 30, 1945.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. M. Whipple, respondent in the above-entitled cause; and

To J. Charles Dennis, United States Attorney, and Herbert O'Hare, Assistant United States Attorney, Proctors for said respondent;

To Clark Nutt, guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, minor children of William Earnest Nutt, deceased, claimant in said cause; and

To Leo M. Koenigsberg, Proctor for said claimant;

To The Honorable Judges of the above-entitled court; and to The Clerk of said court:

You, and each of you, will please take notice that C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity and Guaranty Company, a Maryland corporation, Libelants in the above entitled

cause, and American Surety Company of New York, a New York corporation, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants,

Hereby Appeal from that certain order or final decree in said cause, against said libelants, and in favor of said respondent and said claimant, which was signed by the Honorable John C. Bowen, Judge of the above-entitled court, filed with the clerk of said court and entered in said cause on November 21, 1945; hereby appealing from the whole of said order or final decree, and from each and every part thereof, unto the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 4th day of December, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for said Libelants, C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, and said Stipulator American Surety Company of New York.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

C. F. Lytle, an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity and Guaranty Company, a Maryland corporation, libelants in the above-entitled cause, and American Surety Company of New York, a New York corporation, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants, hereby respectfully assign errors in the proceedings in said cause and in the findings, conclusions and rulings of the above-entitled court, and its order or final decree signed, entered and filed in said cause on November 21, 1945, as follows:

(1) The court erred in finding, concluding and holding that the record of the proceedings before the Deputy United States Compensation Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment; and in failing to find, conclude and hold the contrary.

(2) The court erred in finding, concluding and holding that said record did not affirmatively establish, so as not to permit any conflicting inference, that the death of William Earnest Nutt was occasioned solely by his intoxication; and in failing to find, conclude and hold the contrary.

(3) The court erred in granting the motion of respondent C. M. Whipple to dismiss the libel

of libelants herein; and in failing to deny said motion.

(4) The court erred in entering the order or final decree on November 21, 1945, granting said motion to dismiss, and dismissing said libel.

Dated this 4th day of December, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for said Libelants, C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, and said Stipulator American Surety Company of New York.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity and Guaranty Company, a Maryland corporation, being the Libelants in the above entitled cause, and American Surety Company of New York, a New York corporation, the stipulator or surety upon the stipulation for costs heretofore filed in said cause by said libelants, as Principals, and Maryland Casualty Company, a corporation

duly organized and existing under and by virtue of the laws of the state of Maryland, and authorized to transact the business of surety in the state of Washington, as Surety, are held and firmly bound unto C. M. Whipple, the respondent in said cause, being the Deputy Commissioner of the United States Employees Compensation Commission, for the Fourteenth Compensation District, and/or his successor in such office, and unto Clark Nutt, as guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, minor children of William Earnest Nutt, deceased, the claimant in said cause, and/or his successor as said guardian, in the sum of Two Hundred Fifty Dollars (\$250.00) in lawful money of the United States, for the full and complete payment of which, well and truly to be made, we, and each of us, hereby bind ourselves and our respective successors and assigns, jointly and severally, firmly by these presents;

The condition of this obligation being as follows, to-wit:

Whereas an order or final decree was entered in the above-entitled court and cause against said libelants and in favor of said respondent and said claimant on November 21, 1945; and said above named Principals are about to take an appeal from said order or final decree, and each and every part thereof, unto the United States Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, if said above bounden Principals shall pay all costs that may be awarded

against them, or any of them if said appeal be dismissed or the order or final decree appealed from affirmed; then this obligation shall be void; otherwise, it shall remain in full force and effect.

Signed and sealed this 3d day of December, 1945.

C. F. LYTLE CO.,

GREEN CONSTRUCTION CO.,

UNITED STATES FIDELITY AND GUAR-

ANTY COMPANY, and AMERICAN

SURETY COMPANY OF NEW YORK,

By MERRITT, SUMMERS, BUCEY & STAFFORD,

MATTHEW STAFFORD,

G. H. BUCEY,

As Their Proctors (Principals).

MARYLAND CASUALTY COMPANY,

[Seal]

By CHARLES NEALEY,

Atty. in Fact (Surety).

[Endorsed]: Dec. 4, 1945.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To The Honorable Judges of the Above-Entitled Court:

C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity and Guaranty Company, a Maryland corporation, libelants in the above-entitled cause, and American Surety Company of New

York, a New York corporation, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants, and each of them, being aggrieved by that certain order or final decree, signed, filed and entered in the above-entitled cause on the 21st day of November, 1945, hereby claim an appeal from the whole of said order or final decree, and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby pray that such appeal may be allowed forthwith by order of the above-entitled court, upon their notice of appeal and assignments of error, heretofore filed herein and duly presented herewith, without issuance of citation.

Dated this 4th day of December, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for said Libelants C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, and said Stipulator American Surety Company of New York.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE AND
CONSENT

Service on this day of the Notice of Appeal, Petition for Appeal, and Assignments of Error, in the

above-entitled cause, of C. F. Lytle Co., Green Construction Co., United States Fidelity and Guaranty Company, the libelants in said cause, and American Surety Company of New York, the stipulator or surety upon the stipulation for costs herein of said libelants; all of which have been filed in the above-entitled court and cause; and service of copy of proposed order granting petition for appeal and allowing said appeal; are hereby acknowledged; and consent is hereby given that presentation of said Notice of Appeal, Petition for Appeal, Assignments of Error, and Order, may be made to, and hearing thereon had in the above-entitled court before, Honorable John C. Bowen, judge of said court, on the 4th day of December, 1945, at 1:55 o'clock P. M. thereof, or as soon thereafter as said presentation and hearing may be had; and that if said appeal be allowed, no citation need be issued thereon.

Dated this 4th day of December, 1945.

J. CHARLES DENNIS,
United States Attorney.

HERBERT O'HARE,
Assistant United States Attorney,
Proctors for respondent above-named.

L. M. KOENIGSBERG,
Proctor for Claimant Above-Named.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR APPEAL

The above-entitled cause having come on duly and regularly for hearing on this day before the above-entitled court, the undersigned judge presiding, upon the petition for appeal of C. F. Lytle Co., Green Construction Co., United States Fidelity and Guaranty Company, libelants in said cause, and American Surety Company of New York, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants, which was then presented to this court, together with notice of appeal and assignments of error of said libelants and said stipulator, heretofore filed herein on this day, and there also being presented therewith the cost bond on appeal, filed herein on this day by said libelants and said stipulator, together with acknowledgment of service and consent signed by the proctors for the respondent and claimant in said cause; and the court having duly considered all of said matters, and being fully advised in the premises;

Does hereby order and adjudge that said petition for appeal is granted and said appeal allowed as prayed for in said petition; and that no citation on said appeal be issued.

Done in open court this 4th day of December, 1945.

JOHN C. BOWEN,

United States District Judge.

Presented by:

C. H. BUCEY,

Of Proctors for Said Libelants and Said Stipulator.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service on this 4th day of December, 1945, of Notice of Appeal, this day filed herein by the above named libelants, and the stipulator or surety upon their stipulation for costs herein, and service on this day of Order Granting Petition for Appeal of said parties, as signed, filed and entered in the above-entitled District Court on this day, are hereby acknowledged.

J. CHARLES DENNIS,

United States Attorney.

HERBERT O'HARE,

Assistant United States Attorney.

Proctors for Respondent
Above-Named.

LEO M. KOENIGSBERG,

By H. S. SANFORD,

Proctor for Claimant Above-Named.

[Title of District Court and Cause.]

AMENDED STIPULATION AS TO RECORD
OR APOSTLES ON APPEAL

It Is Stipulated by and between the appellants in the above-entitled cause, C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, being the libelants therein, and American Surety Company of New York, being the stipulator or surety upon the stipulation for costs of said libelants; and the appellees therein, C. M. Whipple, being the respondent in said cause, and Clark Nutt, guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, minor children of William Earnest Nutt, deceased, being the claimant therein, as follows:

I.

That for the purposes of the appeal by said appellants to the United States Circuit Court of Appeals for the Ninth Circuit, referred to in the Notice of Appeal and Petition for Appeal filed in said cause by said appellants on December 4, 1945, there shall be included in the printed record or apostles on appeal the following:

(1) The libel of C. F. Lytle Co., et al, filed herein on July 19, 1945 (omitting therefrom the copy of compensation order and award of compensation of the Deputy Commissioner).

(2) The libelants' Stipulation for Costs, on which said American Surety Company of New

York is stipulator or surety, filed herein on July 19, 1945.

(3) Libelants' Application for Interlocutory Injunction, filed herein on July 19, 1945.

(4) Minute entry of order of court rendered August 6, 1945, denying libelants' application for interlocutory injunction.

(5) Respondent C. M. Whipple's Motion to Dismiss the Libel, filed herein on October 3, 1945.

(6) Certification dated at Seattle, Washington, on October 31, 1945, and signed by C. M. Whipple, Deputy Commissioner.

(7) The following items, and only the following items, from the record so certified by C. M. Whipple, Deputy United States Compensation Commissioner, which record was filed herein on November 1, 1945:

(a) Item No. 40, consisting of a transcript of proceedings before William M. Growden, United States Commissioner and ex-officio Coroner, Fairbanks Precinct, Fourth Judicial Division, Alaska, in the matter of the inquest upon the body of Willian Earnest Nutt, deceased, at Fairbanks, Territory of Alaska, on July 29, 1942;

(b) Item No. 41, consisting of deposition on written interrogatories of A. A. Lyon;

(c) Item No. 42, consisting of deposition on written interrogatories of W. H. Green;

(d) Item No. 43, consisting of deposition on written interrogatories of Ralph Green;

(e) Item No. 44, consisting of deposition on written interrogatories of Robert L. Nine;

(4) Item No. 45, consisting of compensation order, award of compensation, filed July 31, 1945.

(8) Motion of Clark Nutt for permission to intervene, filed herein on November 5, 1945.

(9) Affidavit in support of said motion, filed herein on November 5, 1945.

(10) Order granting permission to intervene, signed, filed and entered herein on November 5, 1945.

(11) Court's oral decision (as announced from the bench, November 19, 1945, by Judge Bowen), sustaining respondent's motion to dismiss the libel, the written memorandum of which decision was filed herein on November 30, 1945.

(12) Order or final decree granting motion to dismiss libel, signed, filed and entered herein on November 21, 1945.

(13) Notice of appeal of the appellants above named, filed herein on December 4, 1945.

(14) Bond for costs on appeal of said appellants, with Maryland Casualty Company as surety thereon, filed herein on December 4, 1945.

(15) Assignments of error, filed herein on December 4, 1945.

(16) Petition for appeal, filed herein on December 4, 1945.

(17) Acknowledgment of service of notice of appeal, etc., and consent to presentation of order allowing appeal, filed herein on December 4, 1945.

(18) Order granting petition for appeal, signed, filed and entered herein on December 4, 1945.

(19) Acknowledgment of service of order granting petition for appeal, filed herein on December 4, 1945.

(20) Order of court, if entered herein, providing for transmission of original record certified by the Deputy United States Compensation Commissioner, as stipulated in paragraph (6) hereof.

(21) This stipulation.

(22) Praeceptum for record or apostles on appeal.

II.

It is further Stipulated that, although no other portions of the record certified by C. M. Whipple, Deputy United States Compensation Commissioner, filed herein on November 1, 1945, are to be printed in the record of apostles on appeal herein, the court is at liberty to consider any or all other parts of said record so certified by C. M. Whipple, the original of which has been transmitted by the clerk of the above-entitled court to the clerk of the United

States Circuit Court of Appeals for the Ninth Circuit, in lieu of copy thereof.

Dated: January 16, 1946.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY, Per M. S.,
Proctors for Said Appellants.

J. CHARLES DENNIS,
United States Attorney.

TOM A. DUNHAM,
Assistant U. S. Attorney.
Proctors for Said Appellee,
C. M. Whipple.

LEO M. KOENIGSBERG,
Proctor for Said Appellee,
Clark Nutt.

United States of America,
Western District of Washington—ss.

CERTIFIED COPY

I, Millard P. Thomas, Clerk of the United States District Court in and for the Western District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Amended Stipulation as to Record or Apostles on Appeal filed on January 17, 1946, in Cause No. 14797, C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United

States Fidelity and Guaranty Company, a Maryland corporation, Libelants, vs. C. M. Whipple, Respondents, Clark Nutt, guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, Claimant, now remain among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Seattle this 18th day of January, A. D. 1946.

(Seal) MILLARD P. THOMAS,
Clerk.
By M. BROOKS,
Deputy Clerk.

[Endorsed]: Filed Jan. 17, 1946.

[Title of District Court and Cause.]

PRAECIPE FOR RECORD OR APOSTLES
ON APPEAL

To the Clerk of the Above-Entitled Court:

Utilizing copies or transcript filed herewith, you hereby are requested to prepare in the above-entitled cause record or apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, supplementing and comparing such copies or transcript to the extent necessary to make, index and certify full, true and complete record or

apostles on appeal, as required by Rule 5 of the Admiralty Rules of said appellate court, and/or by Rule 75 of the Federal Rules of Civil Procedure, containing the items specified in the stipulation as to record or apostles on appeal, filed herein; all other motions, stipulations, orders, and other matters, if any, filed subsequent to December 4, 1945, prior to certification of said record or apostles, relating to or in connection with the appeal herein; and this praecipe.

Dated December 7, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for Appellants, C. F. Lytle Co., Green
Construction Co., United States Fidelity and
Guaranty Company, and American Surety Com-
pany of New York.

Copy received December 7, 1945.

J. CHARLES DENNIS,
United States Attorney.
Proctor for Appellee, C. M.
Whipple.

L. M. KOENIGSBERG,
Proctor for Appellee, Clark
Nutt, guardian, etc.

[Endorsed]: Filed Dec. 7, 1945.

[Title of District Court and Cause.]

ORDER AUTHORIZING TRANSMISSION
OF ORIGINAL RECORD

Upon motion of appellants, and in accordance with stipulation of appellants and appellees, on file in the above entitled cause, it appearing to the court proper;

It hereby is Ordered that, in connection with the appeal of said appellants to the United States Circuit Court of Appeals for the Ninth Circuit, in the said cause, that certain original record certified by C. M. Whipple, Deputy United States Compensation Commissioner, and filed herein on November 1, 1945, shall be withdrawn by the clerk of this court from the files herein, and transmitted to the clerk of said appellate court, in lieu of copies, and as part of said appellants' record or apostles on appeal in said cause.

Done in open court this 7th day of December, 1945.

Presented by:

G. H. BUCEY,

Of Proctors for Said Appel-
lants.

JOHN C. BOWEN,

United States District Judge.

We consent to entry of the foregoing order.

J. CHARLES DENNIS,
United States Attorney.

Proctor for Said Appellee,
C. M. Whipple.

L. M. KOENIGSBERG,
Proctor for Said Appellee,
Clark Nutt, Guardian, etc.

[Endorsed]: Filed Dec. 7, 1945.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 48, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Praeceptum and Designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that

the same, together with Record certified by C. M. Whipple, Deputy United States Compensation Commissioner, filed on November 1, 1945, the original of which is sent up as part of this record, constitute the apostles on appeal from the Decree of said United States District Court for the Western District of Washington to the United States Circuit Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Act of February 11, 1925) for
making Record, certificate or return:

15 folios at 15c	\$ 2.25
118 folios at 05c	5.90
Appeal fee (Section 5 of Act).....	5.00
Certificate of Clerk to Apostles on Appeal....	.50
Certificate of Clerk to Record Certified by C. M. Whipple50
<hr/>	
Total	\$14.15

I further certify that the above amount has been paid to me by the proctors for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District

Court at Seattle, in said District, this 21st day of December, 1945.

[Seal]

MILLARD P. THOMAS,

Clerk.

By PERCY MADDUX,

Deputy.

[Endorsed]: No. 11217. United States Circuit Court of Appeals for the Ninth Circuit. C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, United States Fidelity and Guaranty Company, a Maryland corporation, and American Surety Company of New York, a New York corporation, Appellants, vs. C. M. Whipple, Deputy United States Compensation Commissioner for the Fourteenth Compensation District, and Clark Nutt, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed December 26, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

In Admiralty—No. 11217

C. F. LYTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation,
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Maryland corporation,
and AMERICAN SURETY COMPANY OF
NEW YORK, a New York corporation,
Appellants,

vs.

C. M. WHIPPLE, Deputy United States Compen-
sation Commissioner for the Fourteenth Com-
pensation District, and CLARK NUTT, guard-
ian of Phyllis Elaine Nutt, Kenneth James
Nutt and Raymond Albert Nutt, children of
William Earnest Nutt, Deceased,
Appellees.

APPELLANTS' STATEMENT OF POINTS,
AND DESIGNATION OF PARTS OF REC-
ORD.

To the Honorable Judges of the Above-Entitled
Court:

Appellants herein, C. F. Lytle Co., Green Con-
struction Co., United States Fidelity and Guaranty
Company, and American Surety Company of New
York, hereby refer to and adopt as their Statement
of Points on which they intend to rely upon their

appeal, all of their assignments of error, included in the apostles on appeal (pages 30 and 31); and

Said appellants, as their Designation of Parts of the Record which they deem necessary for consideration on said appeal, hereby designate all of said apostles on appeal (pages 1 to 48), including the original record certified by C. M. Whipple, Deputy United States Compensation Commissioner, which is part of said apostles on appeal, in accordance with the stipulation of December 7, 1945, shown in said apostles (pages 41 to 44), including all portions of the record specified in appellants' praecipe, shown in said apostles (pages 45 and 46).

Respectfully submitted,

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for Said Appellants.

Copy received December 21, 1945.

J. CHARLES DENNIS,

United States Attorney.

Proctor for Appellee, C. M.
Whipple.

L. M. KOENIGSBERG,

Proctor for Appellee, Clark
Nutt, Guardian, etc.

[Endorsed]: Filed December 26, 1945. Paul P.
O'Brien, Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. F. LYTLE Co., an Iowa corporation, GREEN CONSTRUCTION Co., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation, *Appellants*,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner, for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

MERRITT, SUMMERS, BUCEY & STAFFORD,
Proctors for Appellants.

Office and P.O. Address:
840 Central Building,
Seattle 4, Washington.

FILED

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. F. LYTLE Co., an Iowa corporation, GREEN CONSTRUCTION Co., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation, *Appellants*,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner, for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

MERRITT, SUMMERS, BUCEY & STAFFORD,
Proctors for Appellants.

Office and P.O. Address:
840 Central Building,
Seattle 4, Washington.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. F. LYTLE Co., an Iowa corporation,
GREEN CONSTRUCTION Co., an Iowa
corporation, UNITED STATES FIDELITY
AND GUARANTY COMPANY, a Maryland
corporation, and AMERICAN SURETY
COMPANY OF NEW YORK, a New York
corporation,

Appellants,

vs.

C. M. WHIPPLE, Deputy United States
Compensation Commissioner, for the
Fourteenth Compensation District, and
CLARK NUTT, Guardian of Phyllis
Elaine Nutt, Kenneth James Nutt, and
Raymond Albert Nutt, children of Wil-
liam Earnest Nutt, deceased,

Appellees.

No. 11217

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

BASIS OF JURISDICTION

This is a proceeding in which appellants seek to have suspended and set aside a compensation order and award of compensation made and filed by the Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission as more particularly set forth in

the libel of appellants (R. 2-7). The jurisdiction of the United States District Court and of the United States Circuit Court of Appeals for the Ninth Circuit is sustained by Section 21 of Public Law 803 of the 69th United States Congress, as amended by Section 3(b) of Public Law 208 of the 77th United States Congress, as amended, which statutes are set forth in Title 33 U.S.C.A., Sec. 921 and in Title 42 U.S.C.A., Sec. 1653(b). Also in support of appellants' position that this court has jurisdiction appellants cite *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. (2d) 513; *Kobilkin v. Pillsbury*, 103 F. (2d) 667, affirmed by an equally divided court in *Kobilkin v. Pillsbury*, 309 U.S. 619, 60 S. Ct. 465 (petition for rehearing denied in 309 U.S. 695, 60 S. Ct. 584).

STATEMENT OF THE CASE

During the evening of June 26, 1942, William Earnest Nutt, an employee of appellants C. F. Lytle Co. and Green Construction Co., left a roadhouse near Big Delta, Alaska. He was one of three passengers riding in the open dump body of one of his employer's trucks. He was intoxicated. Shortly thereafter, and during the ride, he sustained fatal injuries. Minor children of William Earnest Nutt, acting through their guardian, filed in the office of the United States Employees' Compensation Commission for the Fourteenth Compensation District at Seattle, C. M. Whipple, Deputy Commissioner, a claim for compensation on account of the death of William Earnest Nutt under the provisions of Public Law 208 of the 77th United States Congress, Act of August 16, 1941, as amended (42 U.S.C.A. Sec. 1651). Proceedings on that claim before the Deputy Commissioner resulted in the filing by the Deputy Commissioner on July 3, 1945, of a compensation order and award of compensation favorable to the claimants and unfavorable to the employer and carrier named in the claim who are appellants here.

The questions involved in this appeal are these:

(1) Is there any substantial evidence in the record, upon which the compensation order herein complained of is based, that the death of William Earnest Nutt arose out of and in the course of his employment?

(2) Does that record affirmatively establish, so as not to permit any conflicting inference, that the death

of William Earnest Nutt was occasioned solely by his intoxication?

These questions were brought before the District Court by appropriate proceedings for review of the compensation order of July 3, 1945, under and according to the provisions of Section 3(b) of Public Law 208 of the 77th United States Congress, as amended (Title 42 U.S.C.A., Sec. 1653(b)), and Section 21(b) of Public Law 803 of the 69th United States Congress, as amended (Title 33 U.S.C.A., Sec. 921(b)), and as extended by said Public Law 208.

SPECIFICATION OF ERRORS RELIED UPON

Appellants rely upon assigned errors Nos. (1), (2), (3), and (4), which are set forth on pages 115 and 116 of the Apostles on Appeal.

ARGUMENT OF THE CASE

It is the position of the appellants that the compensation order and award of compensation of July 3, 1945, for the review of which this suit has been brought, is not in accordance with law

“Because the record upon which the compensation order and award of compensation is based contains no substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment, and because the same record establishes affirmatively that the death of William Earnest Nutt was occasioned solely by the intoxication of said William Earnest Nutt.”
(Art. VII, Libel, R. 5, 6)

To obtain clarity and to avoid repetition appellants do not segregate their argument in respect of assigned errors (1) and (2) which are:

(1) The court erred in finding, concluding and holding that the record of the proceedings before the Deputy United States Compensation Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment; and in failing to find, conclude and hold the contrary (R. 115).

(2) The court erred in finding, concluding and holding that said record did not affirmatively establish, so as not to permit any conflicting inference, that the death of William Earnest Nutt was occasioned solely by his intoxication; and in failing to find, conclude and hold the contrary (R. 115).

The Deputy Commissioner's compensation order

award of compensation of July 3, 1945, contains specific findings by the Deputy Commissioner

“that deceased became intoxicated early in the evening” and “that deceased was in a happy stage of intoxication.” (R. 101)

Appellants omit as needless exercise the detailing of the more than ample evidence from which the Commissioner made those findings; no question is raised regarding those findings on this appeal.

This review must begin, therefore, with the acceptance as facts that the deceased became intoxicated early in the evening of June 26, 1942 (the date on which he met his death (R. 101)), and that he was intoxicated during the ride which resulted in his death.

The Commissioner, having found as a fact that the deceased was intoxicated at the time of the accident which resulted in his death, would logically be expected to make findings in respect of the questions:

(a) Was the decedent's death due to a peril or risk involved in or incidental to the deceased's employment or to the conditions under which deceased's employment was required to be performed, and

(b) Was the decedent's death due solely to decedent's intoxication?

With all respect, appellants suggest that the Commissioner failed to give due consideration to these, and particularly to the first of these questions. The language of the Commissioner's compensation order award of compensation (R. 99) when read in its entirety in the light of the record leaves the impres-

sion that the Commissioner assumed that the deceased was in the course of his employment when he left the roadhouse in the truck; that the deceased's actions in standing up in the truck (R. 39, 52) and in stepping over the side of the truck (R. 39) did not constitute any departure by deceased from the course of his employment; that the deceased's statements, which were coincidental with his standing up in and stepping from the truck, that there was a moose out there (R. 39) and "Let's get out and walk" (R. 39) did not manifest any intent on the part of deceased to embark on a venture of his own; most importantly, that as long as deceased was in his employer's truck, regardless of how outrageously he might have conducted himself, he remained in the course of his employment, and, therefore, that the only question which the Commissioner had to decide was whether he voluntarily stepped or jumped from the truck or was thrown from the truck by reason of a bump or jolt.

While it is the view of appellants that the question whether he stepped or jumped from the truck or was bounced out of the truck is not controlling, appellants regard an analysis of the Commissioner's and of the District Court's dispositions of that question as useful and necessary in this brief.

Keeping in mind that the deceased was intoxicated during the entire period which elapsed between the time the truck upon which he was riding left the roadhouse and the time at which deceased met his death, we respectfully ask the court critically to examine the fol-

lowing portion of the Commissioner's findings and the evidence in this record which is relevant to this portion of the findings. The findings are these:

"* * * that when about four miles from the barracks and while deceased was standing in the body of the truck, one of the wheels struck either a hole in the road or an obstruction, catapulting the deceased over the side of the truck; that he landed first on his feet and then slid forward about twenty feet; that neither of the rear wheels struck the deceased; that the deceased died from a broken neck almost instantly * * *." (R. 101)

Separated for the purpose of this examination the important facts contained in this language are these:

- (a) Deceased was standing in the body of the truck;
- (b) One of the wheels struck either a hole in the road or an obstruction;
- (c) Deceased was catapulted over the side of the truck by reason of the wheel so striking;
- (d) Deceased landed first on his feet.

There are to be noticed some facts established without dispute in the record in respect of which no reference or finding is made by the Commissioner. We refer to the description of the truck given by United States Marshal Buckley which is contained in this record (R. 32). Mr. Buckley states that the truck was a dump truck with a dump box on the rear; that the floor of the box was about four feet off the ground; that the sides of the box rose about eighteen inches above the floor of the box. We refer also to some facts contained in the testimony of Ray Johnston, which we

regard of controlling importance, which will be discussed in detail herein.

Most important of all is the fact that, although there were six men riding in the truck, including the driver, only one of these men saw the accident occur. He was Ray Johnston. Messrs. Brown and Welchell were riding in the cab of the truck. Welchell says that he did not see the accident happen, but that two minutes earlier he looked back and that “* * * they were all laughing and talking * * *” (R. 27); Brown testified that “* * * a few minutes before the truck stopped I glanced back and saw Ernie (the deceased) standing up in the truck * * *” (R. 52); Berg knew nothing of the accident happening; Jack Johnston, although he was not in the cab but in the dump box, testified that he was not looking at the time, did not see the accident and that the first he knew of the accident was when he saw the deceased as the latter was rolling along the ground behind the truck. This means that the only direct evidence—in fact the only evidence, direct or circumstantial, which this record contains relating to the manner of the happening of this accident, is the testimony of Ray Johnston.

The testimony of Ray Johnston is of such importance in this case that appellants deem it advisable to set it forth in full. It should be noted that his testimony was given in response to oral interrogatories propounded by Mr. Harry O. Arend, Assistant United States Attorney at Fairbanks, Alaska, during a formal Coroner's inquest upon the body of William Earnest Nutt, deceased, and also in response to questions propounded by the Coroner's jury and the Coroner

himself. The testimony of Ray Johnston (R. 37) follows:

“RAY JOHNSTON, being first duly sworn, testified as follows:

Q State your full name?

A Ray Edward Johnston.

Q Where do you live, Mr. Johnston?

A Guernsey, Iowa.

Q Where are you temporarily residing?

A At Lytle and Green, Big Delta.

Q Were you acquainted with William Ernest Nutt?

A Yes, sir.

Q How long had you known him?

A Well, for the length of his stay out there—between 3 and 4 weeks.

Q Did you see him last Friday, June 26th?

A Yes, sir.

Q Where did you see him at that time?

A The last time I seen him—you mean alive?

Q Yes.

A Was getting out of the truck.

Q Where at?

A Four or five miles North or South of Big Delta.

Q At that time you saw him get out of the truck. What kind of truck?

A V-8 dump truck. About a 39 or 40.

Q Who all was in the truck?

A There were five of us. Otto Berg, Jimmy Brown, Harold Johnston, Carl—I don't know Carl's last name—no, Walter. And myself.

Q Where were you sitting at the time?

A I was sitting in the left hand corner in the back of the truck on the floor.

Q Who else was in the back?

A Harold Johnston was sitting in the back and Ernie was sitting in the right side.

Q Is Harold related to you?

A My brother.

Q Do they call him Jack?

A That's right.

Q Who was in the front? Who was driving?

A Otto Berg was driving.

Q Who was with him up in front?

A Otto was driving and there was Walter and Jimmy Brown.

Q How did Nutt get out of the car—truck?

A He raised up and just stepped out—whether accidentally or how—but that's how he done it.

Q You say he stepped out?

A That's right.

Q Did he have to make any effort?

A No.

Q Did you see him get up and get out?

A Yes, sir.

Q Will you demonstrate just how he did it?

A He just got up and raised his foot over like that (demonstrating) and said, 'Let's get out and walk.' I thought he was joking and didn't think he meant it.

Q How fast was the car going?

A I wouldn't think over 15 miles an hour.

Q Did he make any other statement right at the time or just before?

A Yes. He said just before that he saw a moose down there and said 'Let's go get it.' I

pushed him back and said 'These are rough roads. You'll fall out,' and didn't think anything more of it.

Q What did you do after he stepped out?

A I jumped out of the back end and went back where he was lying.

Q Did the car keep on going?

A For a slight ways, yes.

Q What did you find?

A He was lying there on his back. I started to give him artificial respiration. I thought he had his breath knocked out.

Q Did he hit himself on any part of the truck?

A Not that I seen.

Q Did you feel anything when he left the truck?

A No, I didn't. When he left I grabbed the back end and jumped out.

Q Can you give any reason for him acting like this?

A No. Any more than just joking.

Q Had he been drinking?

A Slightly.

Q Was he drunk?

A I wouldn't say that he was, no.

Q Is there anything you can add that would make it easier for the jury to determine the actual cause of the death?

A I don't know what it would be.

Q Did he seem to have any financial worries?

A He was happy and laughing when he done that.

Q Had you ever observed him drinking before that?

A I don't believe I ever have.

Q He had never been drunk in your presence?

A No.

Q Do you think in your own mind that he knew what he was doing?

A I think he knew what he was doing but I think he was just joking. I don't think he intended to go that far.

QUESTION BY JURY: Do you think when he stepped over the edge of the truck body he apparently thought that he would step out on the ground—was he in that sort of mental condition—so that his body could have turned over?

A I don't think he figured on letting his foot go down there that far.

Q He would have a tendency of stepping over the edge to bring him in a sort of revolving motion and the wheel might catch him if he was far enough ahead of the hind wheel? Were there any chains on the side of the truck?

A I don't think there was. I don't believe there was a chain hanging on the side of the truck.

QUESTION BY CORONER: When he went over the side you saw him clear the bed of the truck?

A Yes.

Q He didn't hang to the truck?

A He went real quick. I jumped out at the same time because I knew he had been hurt.

QUESTION BY JURY: When he hit the ground did he hit with his feet?

A I thought he hit with his feet and then rolled over on his shoulder and head.

MR. AREND: If he stepped out of there how did he happen to hit the ground so as to make an impression of both feet?

A It is quite a ways from the side of the truck to the ground. It is several feet down. Those things happen so quick it is hard for a person to see."

Second in importance only to the testimony of Ray Johnston is the testimony of John J. Buckley, Chief Deputy United States Marshal for the Fourth Judicial Division of the Territory of Alaska. That testimony (R. 32), which was given at the same inquest as that at which the testimony of Ray Johnston was given, follows:

"JOHN J. BUCKLEY, being first duly sworn, testified as follows:

Q Your name is John J. Buckley?

A Yes, sir.

Q You are the Chief Deputy Marshal for this Division?

A Yes, sir.

Q Were you acquainted with William Ernest Nutt?

A No, I wasn't. Not until after his death.

Q Did you see his body after his death?

A Yes, sir.

Q On what day?

A On Saturday. Last Saturday, June 27th.

Q At what time?

A About 3 o'clock A. M.

Q Where?

A About 3 miles south of Big Delta on the Richardson Highway.

Q In what kind of surroundings?

A He was laying in the road with his feet toward the bank of the road, lying on the shoulder

of the road with his head quite close to the travel marks on the road. As a matter of fact, it was right on the edge of the travel wear of the road. Lying with his face looking towards the woods on the right hand side of the road going out.

Q Were his feet pointing to Fairbanks or towards Valdez?

A Right at that spot I don't know the directions but he was on the right hand side of the road with his feet pointing toward the ditch.

Q Right hand?

A He was lying this way (motioning) with his feet toward the ditch. Right on the shoulder.

Q More cross ways of the road?

A He was directly across the road.

Q Any part of his body in the road bed?

A His head was on the outside of the regular travel of the road.

Q Just outside?

A You would have to turn out around him to get around. There were marks there where cars had traveled.

Q Was anyone else there?

A Jim Brown and Ray Johnston and the book-keeper for Lytle and Green. I don't recall his name.

Q Did anyone else go out with you?

A Mr. Growden, U. S. Commissioner and I and Patrolman Buster Anderson.

Q Did you make an inquiry there as to the cause of this man's death?

A Yes.

Q What did you find?

A I found out from Ray Johnston who was

watching the body that they had been down to Big Delta and I found out later that they had been sent to Big Delta by the foreman to make some repairs on the boat which they had done and had been scheduled to go home about 8 or 8:30 in the evening. A man by the name of Otto Berg wasn't going back until later and these men, Nutt and the two Johnston brothers and one other decided to stay there and wait for Otto Berg. They had been drinking considerable and my information was that Nutt had drunk very heavily and had passed out. They put him in bed and he got up and seemed to be all right—got into the truck by himself and the three of them sat in the truck with their backs toward the cab. They traveled about three miles to where the body was when Ray Johnston said that Ernest Nutt made the remarks: 'There's a moose out there. Here's where I get off.' The next thing they knew he was gone, whether he fell out or jumped out. Johnston wasn't altogether sober. It appears that the ground at the point where he hit the ground was on a straight of way after they had gone around a small curve and had got out into the straight of way on the road and traveled 200 feet from the curve, and showed marks where he hit the ground apparently with his feet spread out. You could see where the ground was broke, and then evidently he went over on his head and face and slid on the ground. His right shoulder had a little bruise. His left side was all bruised and scratched and along his face where the flesh had hit, the gravel was ground into the side of his face. The body was warm when we got there. Both the Commissioner and myself looked for wounds on the body—picked up his head and I believe—we were certain his neck was broken

because the neck was twisted around as though there was nothing there to hold it and we could feel what we thought was a broken vertebra—about the fourth vertebra from the skull. There was no other marks on the body except the evidence that he slid. I stepped that off from the place where he hit and the body had not been disturbed and it was about 20 feet. Otto Berg was questioned as to what speed he was traveling when he went around the curve and he said between 20 and 25 miles, and that was possible. After he got around this curve he felt the dual tire jump up in the air and strike the ground again. He stopped the car. He didn't know at the time that Nutt had gone over. He was of the opinion that the dual tire on the right hand side of the car struck Nutt when he went over. The examination of the truck we made, the position Nutt was sitting, he couldn't have jumped out of the truck and been hit by the wheels. The car would be by him when he hit the ground. But that might be explained—that jar might be explained that when he got up he had to spring from the bottom of the truck to get out and he might have thought that was the jar. The clothing—he had on a slicker—one of these oil slickers—the marks on his left arm showed no imprint of any tire. Neither did his face or head or chest. You could see no marks at all of tire treads.

Q Did you see the truck they were driving in?

A Yes.

Q Was there any possibility to fall between the body and the back of the cab?

A No. The bed of the truck —

Q You saw no evidence of tire marks on the body and in your opinion it wouldn't have been

possible for him to fall under the back wheels if he jumped out?

A If he jumped it would have been utterly impossible for him to strike the rear wheel. That was my opinion anyway because the truck bed is quite high—I think it is about four feet from the ground to the bottom of the bed of the truck then it has a ten-inch high box on it and above that a piece of wood to extend the box up higher. He would have to jump at least eighteen inches to spring over to get away from it. By the time he hit the ground the truck would be by him.

Q Did you see any evidence of foul play?

A No.

QUESTION BY JURY: You think he went over the side of the truck?

A He had to go out the side of the truck. The position showed that the first marks were on the right hand side outside the travel of the cars.

Q You think he had been dragged?

A I know he had been dragged—he skidded along the road.

MR. AREND: He was dragged by his own force?

A After he hit the ground, he collapsed, turned over and slid. Mr. Berg, who was driving the truck at the time, is almost certain in his own mind that the dual tire went over him, but there is no evidence that we can see and we looked for that after we talked to Berg, and we couldn't see any marks of the tire.

Q Were any bones broken?

A We couldn't find any. Only the neck. I tried his right ankle, the one he hit the ground with. There was no crunching of the bones and no fracture that we could feel."

Dr. A. J. Schaible testified at the inquest that the deceased was in the neighborhood of six feet tall and was quite muscular (R. 31).

According to Ray Johnston, Earnest Nutt was standing on the floor of the truck when he jumped or stepped from the truck (R. 39). Because of the height of the sides of the truck body or dump box, according to Deputy Marshal Buckley (R. 36, 37), a person or object resting on the floor of the dump box of the truck would have to rise or be raised at least eighteen inches in order to clear the side of the dump box so as to leave the dump box in that manner. The road was smooth at the place where the death occurred, according to Walter Welchell (R. 27), and according to Jack Johnston (R. 49). The only other testimony regarding the condition of the road was given by Robert L. Nine by deposition, which is a part of the record herein (R. 83-98). In that deposition Mr. Nine testified that the road was wet and rutted, but at no point in the deposition does he state that these conditions existed at the point where the accident occurred; although it was five hours after the accident before Mr. Nine arrived at the scene of the accident, he nevertheless felt justified in volunteering his opinion "that as the truck rounded the curve it hit a chuck hole and the deceased was thrown out on the ground" (R. 95). However, in answer to Interrogatory 34 in his deposition Mr. Nine seems to have forgotten that opinion, because in answer to Interrogatory 34 he says that when he arrived at the scene of the accident the body was about 500 feet past the curve (R. 90). All of the testimony given on the point by witnesses

who were present at the time of the accident or who came up before the body had been moved fixed the point of the accident as about two hundred feet past the curve. Mr. Nine alone fixes the point at which the body came to rest at five hundred feet past the curve. It is proper to assume that his statement that the road was wet and rutted was made with reference to a point or area five hundred feet beyond the curve; his testimony is valueless in respect of the condition of the road two hundred feet beyond the curve, particularly in the light of the positive statements of the other witnesses that the road was smooth at the point where the accident occurred. Mr. Nine relinquishes all claim to credibility when he says that the deceased could have been thrown out of the truck as it rounded the curve so that the body would come to rest 500 feet beyond the curve.

The Commission has found as facts that one of the wheels struck either a hole in the road or an obstruction with such force as to "catapult" the muscular six-foot decedent, who was standing in the dump box of the truck, over the eighteen-inch high side of the truck, in a direction at right angles to the direction in which the truck was travelling, in such a manner that the decedent landed with both feet striking the road bed simultaneously (R. 101). This means obviously that the force of the bump was sufficiently great either (a) to throw the decedent straight up in the air from a standing position inside the truck until his feet were more than eighteen inches above the floor level, then to the right so as to clear the side of the truck body and the rear wheel, then downward to the ground so

as to permit the decedent to land with both feet striking simultaneously on the road bed on the right side of the road; or (b) to throw the decedent outward over the right side of the truck body and in such a manner as to permit him (a man six feet tall) to make a complete somersault in a space five feet above the ground so as to land with both feet striking the road bed simultaneously and with the direction of his fall still at right angles to the direction in which the truck was travelling.

Appellants submit that the foregoing analysis of the Commissioner's treatment of the question whether the deceased stepped or jumped from the truck or was bounced out of the truck shows that there was no substantial evidence before the Commissioner from which he could have made the finding which he did make on this question. The analysis seems also to show that the Commissioner regarded that one question as controlling and, as will be shown later in this brief, appellants respectfully submit that the District Court seems to have followed the Commissioner in that mistaken view.

Actually, of course, the findings of the Commissioner as affirmed by the District Court which appellants are attacking in this proceeding are the findings that the fatal injury arose out of and in the course of deceased's employment and was not due solely to the deceased's intoxication.

In order for these findings to be left undisturbed by this Court this Court must hold that the record before the Commissioner contained substantial evidence

from which the Commissioner could have made those findings.

In *Avignone Freres, Inc., v. Cardillo* (U.S.C.A. D.C. 1940) 117 F.(2d) 385, the court said:

“Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” (Citing *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L.ed. 126)

Avignone Freres, Inc., v. Cardillo, 117 F. (2d) 385, 386.

What relevant evidence is there in this record which could be accepted by a reasonable mind as adequate to support those findings of the Commissioner in this case?

In order for the Commissioner to find that the death of William Earnest Nutt arose out of and in the course of his employment it was necessary for the Commissioner to find that the death of William Earnest Nutt resulted from a peril or risk involved in or incidental to his employment or to the conditions under which his employment was required to be performed.

Specifically what was the risk or peril to which the deceased was exposed and because of which he met his death? It was the persistence of the deceased in standing up in the body of the truck after he had been warned of the danger of doing so (R. 39, 52) and his act of stepping out of the truck (R. 39). Clearly, neither his employment directly nor his employment indirectly through the incident of his transporta-

tion exposed him to any such peril. Up to the time the deceased stood up in the truck the deceased was seated in complete safety in the truck with his back toward the cab (R. 34, 38, 52). The case would be somewhat different if the truck in which he was being transported had been so crowded as to require him to stand, although it would be difficult even then to find evidence in this record which would reasonably justify an inference that the slight jolt or bump to which Otto Berg testified could have thrown the deceased from the truck in the manner in which he did leave the truck.

Ray Johnston (R. 40) and Jack Johnston (R. 48), who were riding in the dump box of the truck with the deceased, stated that they felt no jolt or jar or bump, that they felt "nothing"; Brown said that just before the truck stopped there was a sort of bump or jar and that he could not associate the jolt with anything and that he could not say that it was a bump in the road (R. 52, 53); Berg, who was driving, said he stopped the truck because he knew something had happened, that there was a jolt or a bounce, that what it was he didn't know, that it was like the truck made a jolt like it had run over a rock (R. 44); Welchell testified that he felt a jar in the truck and thought the truck must have hit something or bumped under the hind wheel (R. 27); Deputy Marshal Buckley thought that the jar was explained by the spring from the bottom of the truck which deceased must have made in order to clear the side of the truck (R. 36); Ray Johnston jumped from the truck immediately after the deceased left the truck so that the departure of the two men

must certainly have so lightened the load in the truck as to be noticeable to those in the cab (R. 40).

It simply is not reasonable to believe that the jolt or jar described by the men who were in the cab of the truck and which was not felt at all by the Johnston brothers, who were in the body of the truck, could have been of sufficient force so as to throw the six-foot muscular (R. 31) deceased from a standing position on the floor of the truck over the right side of the truck and at right angles to the direction in which the truck was travelling so as to cause him to strike the road in the manner in which the Commissioner finds he did strike the road. Appellants regard the finding that deceased was catapulted over the side of the truck because one wheel struck a hole or obstruction as unreasonable and as not being supported by any substantial evidence because it involves a rejection of a physical law—assuming that the deceased did not step or jump from the truck but was standing in the truck (R. 101), it is submitted that no ordinary jolt or jar resulting from one of the wheels striking either a hole in the road or an obstruction could have thrown the deceased over the side of the truck at right angles to the line of travel so that he would land on both feet simultaneously *and then slide forward* (in the direction of travel of the truck) twenty feet; whereas, it is not only a reasonable but practically a necessary conclusion that if the deceased jumped or stepped from the truck as Ray Johnston, the only eye witness, says he did, he would land on both feet and would then fall and slide forward in the direction in which the

truck was travelling, just as a person leaving a moving street car or train would do.

It is notable that all of the physical facts which appear in this record regarding the position and condition of the deceased's body after the accident confirm and verify the testimony of Ray Johnston and are at odds with the findings of the Commissioner.

Appellants call particular attention to the oral decision of Judge Bowen which is set forth on pages 111, 112 and 113 of the Record. Judge Bowen's views on the merits are set forth in two paragraphs of that decision.

"I do not hesitate to say that I feel that the Deputy Commissioner made a mistake in arriving at the decision and conclusions announced by him, but I am unable to say that as a matter of law there is no substantial evidence to support the action of the Deputy Commissioner. On the contrary, I am inclined to think there is some substantial evidence to support the Deputy Commissioner, notably the testimony of witness Berg, the truck driver, that he felt a jarring of the truck at the time of the accident, and for that reason it seems to me under the statute this Court is without authority to change the result arrived at by the Deputy Commissioner.

"I repeat, however, that I think the Commissioner made a mistake. I think in view of the testimony of Ray Johnston as to what took place in respect to those things connected with the accident, that the more direct and positive proof in this case is more convincing that the decedent, while in a partially intoxicated condition and in a spirit of playfulness or bravado or acting under

alcoholic stimulant, stepped out of that truck, himself, and that he was not thrown out of the truck by any jarring of the truck caused by rough roads. That is what I think about it, but I assume from the statute that my thought in the matter is of no concern in view of the fact that this Court cannot hold as a matter of law that there is no substantial evidence to support the Deputy Commissioner's action."

While it is interesting to note that the District Court recognized the difficulty of agreeing with the Commissioner in respect of the Commissioner's finding that the deceased was catapulted over the side of the truck by any jolt or jar, it is more important to note that both the Deputy Commissioner and the District Court failed to deal with one of the two controlling questions raised in this controversy.

The compensation order award of compensation (R. 99) and the District Court's oral decision (R. 111, 112, 113) contained no language indicating that any consideration was given to the question whether the death resulted from exposure to a peril involved in or incidental to the employment of the deceased or to the conditions under which that employment was required to be performed.

The District Court's decision is also silent in respect of the question whether or not the death was due solely to intoxication of the deceased.

Let us assume, without conceding, that the District Court was correct in holding that the record before the Deputy Commissioner did contain some substantial evidence in support of the Deputy Commissioner's finding that a jolt or bump occurred which was of

sufficient violence to catapult the deceased over the side of the truck and onto the roadway. It is the position of the appellants that such a holding, even if correct, could not by itself justify the District Court's decision that the Deputy Commissioner's compensation order award of compensation of July 3, 1945, was in accordance with law; it was necessary for the District Court first to find that the record before the Deputy Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment, and further that the same record failed affirmatively to establish that the death of William Earnest Nutt was occasioned solely by his intoxication. If the District Court could not make *both* of these findings, the District Court could not correctly hold that the compensation order award of compensation was in accordance with law.

Appellants submit that both the Deputy Commissioner and the District Court failed to recognize (a) that it was William Earnest Nutt's departure from the course of his employment in standing in the truck and in indulging in the conduct which this record clearly discloses which alone placed him in a position of peril and (b) that it is unreasonable to believe that William Earnest Nutt would have so conducted himself if he were not in an intoxicated condition.

Appellants hasten to point out that it was not necessary for the District Court and it is not necessary for this court to hold with appellants on both of these propositions. If appellants are correct in asserting that the peril to which William Earnest Nutt exposed himself as a result of which he died was a peril cre-

ated by his own departure from the course of his employment or was a peril which was not incidental to his employment or the conditions under which his employment was to be performed, then the decision of this case should be in favor of appellants regardless of the finding which the court may make in respect of the question of intoxication.

An injury cannot be said to arise out of the employment unless it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed; the fact that the injury is contemporaneous or coincident with employment is not alone a sufficient basis for an award.

Fazio v. Cardillo (U.S.C.A. D.C.) 109 F. (2d) 835, 836.

Assuming that William Earnest Nutt was in the course of his employment when he left Rika's roadhouse in appellants' truck (R. 100, 101) it would seem logical, if not inevitable, that this inquiry should proceed to a determination of the question whether his transportation in that truck exposed him to a risk or peril which caused his death.

Six men, including the driver, were riding in the truck; three of them, including the deceased, were riding in the back or truck body. Exclusive of the deceased no one was injured. That fact is important because it directs attention to the question why, of at least three men exposed to exactly the same risk, was only one injured?

The answer to that question is, of course, that the risk, if any, to which the transportation itself exposed these men did not cause deceased's injuries. The central fact from which flowed the tragic consequences giving rise to this controversy is the fact of deceased's intoxication. When the deceased persisted in standing in the body of the truck (testimony of Ray Johnston, R. 39; testimony of James F. Brown, R. 52), and when the deceased said, "Let's get out and walk" and stepped out of the moving truck (testimony of Ray Johnston, R. 39), he completely departed from the course of his employment and exposed himself to a grave peril which not only was not involved in or incidental to his employment but was the immediate and inevitable result of his departure from his employment.

In determining whether a servant's acts are for the purpose of serving the master or are such as to constitute a deviation from the course of his employment

"It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. The act is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master. However, it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined."

Restatement of Agency, Sec. 235.

In *Morgan v. Hoague* (App. D.C.) 72 F.(2d) 727, it is said:

"In order to determine whether the injury in this case arose 'in the course of' the deceased's employment, reference must be had to the time,

place, and circumstance under which the injury occurred.”

Morgan v. Hoague (App. D.C.) 72 F.(2d) 727.

That the deviation from the course of the employment may be simultaneous with the casualty is clearly established by the decision of the Fifth Circuit Court of Appeals in *Hundley v. Hartford Accident Company*, 87 F.(2d) 416, in which case an oil company distributor bought an airplane which he intended to use both for his own pleasure and on company business. One Sunday morning he went out to the airport to endeavor to sell his company's gasoline to the manager. He entered the hangar where his plane was housed to watch two men polish his plane. He decided to help them, by using a mechanical buffer. While he was trying to clean this buffer with gasoline, it exploded, fatally burning him. *The court said that the deviation from his employment occurred when Hundley took hold of the buffer.*

The Restatement of Agency, Sec. 235, also contains this language:

“The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business.”

Restatement of Agency, Sec. 235.

Application of these principles to the facts in this case is a simple and conclusive exercise. Assuming that deceased was in the course of his employment at the beginning of the ride during which he met his death, we find it established by this record that shortly before

he met his death he stood up in the truck while the truck was passing over rough road, and said "he saw a moose down there" and said, "lets go get it" (testimony of Ray Johnston (R. 39); testimony of James F. Brown (R. 52)). If there was nothing else in this record regarding the matter of deviation, it seems that any reasonable mind must conclude that when the deceased, who had ridden with complete safety for several miles while seated in the bed of the truck, stood up in the truck on a rough road, stated that there was a moose out there and invited his companions to join him in going to get it, he committed a complete deviation from the course of his employment, for the consequences of which the employer cannot fairly be held responsible. When to those facts is added the testimony of Ray Johnston that deceased voluntarily stepped out of the moving truck and the physical facts which have been accepted by the Commissioner as true, it seems to appellants that the conclusion must be inescapable that deceased's departure from the truck could not have occurred in the course of his employment.

The clear common sense of the situation disclosed by this record is that the deceased, who had only to remain seated in the truck in order to remain in the course of his employment as well as in complete safety, acted in the outrageous manner in which he did act simply and solely by reason of his intoxication which has been found as a fact by the Commissioner; that by reason of his stimulated condition he became oblivious to the danger of his situation and, ignoring it, acted in such a manner as to bring about his own death.

Assigned errors Nos. (3) and (4):

(3) The court erred in granting the motion of respondent C. M. Whipple to dismiss the libel of libellants herein; and in failing to deny said motion (R. 115, 116).

(4) The court erred in entering the order or final decree on November 21, 1945, granting said motion to dismiss and dismissing said libel (R. 116).

In support of their assignments of error (3) and (4) appellants adopt by reference their argument in support of their assignments of error (1) and (2).

It would seem necessarily to follow that if this court decides favorably to appellants the questions raised by appellants in either assigned error (1) or assigned error (2), this court must decide favorably to appellants the questions raised by assigned errors (3) and (4).

Respectfully submitted,

MERRITT, SUMMERS, BUCEY & STAFFORD,
MATTHEW STAFFORD
G. H. BUCEY

Proctors for Appellants.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

C. F. LYTTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation, UNITED
STATES FIDELITY AND GUARANTY COMPANY,
a Maryland corporation, and AMERICAN SURETY
COMPANY OF NEW YORK, a New York corporation,
vs. Appellants,

C. M. WHIPPLE, Deputy United States Compensation
Commissioner for the Fourteenth Compensation
District, et al, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE C. M. WHIPPLE

J. CHARLES DENNIS
United States Attorney

GUY A. B. DOVELL
Assistant United States Attorney

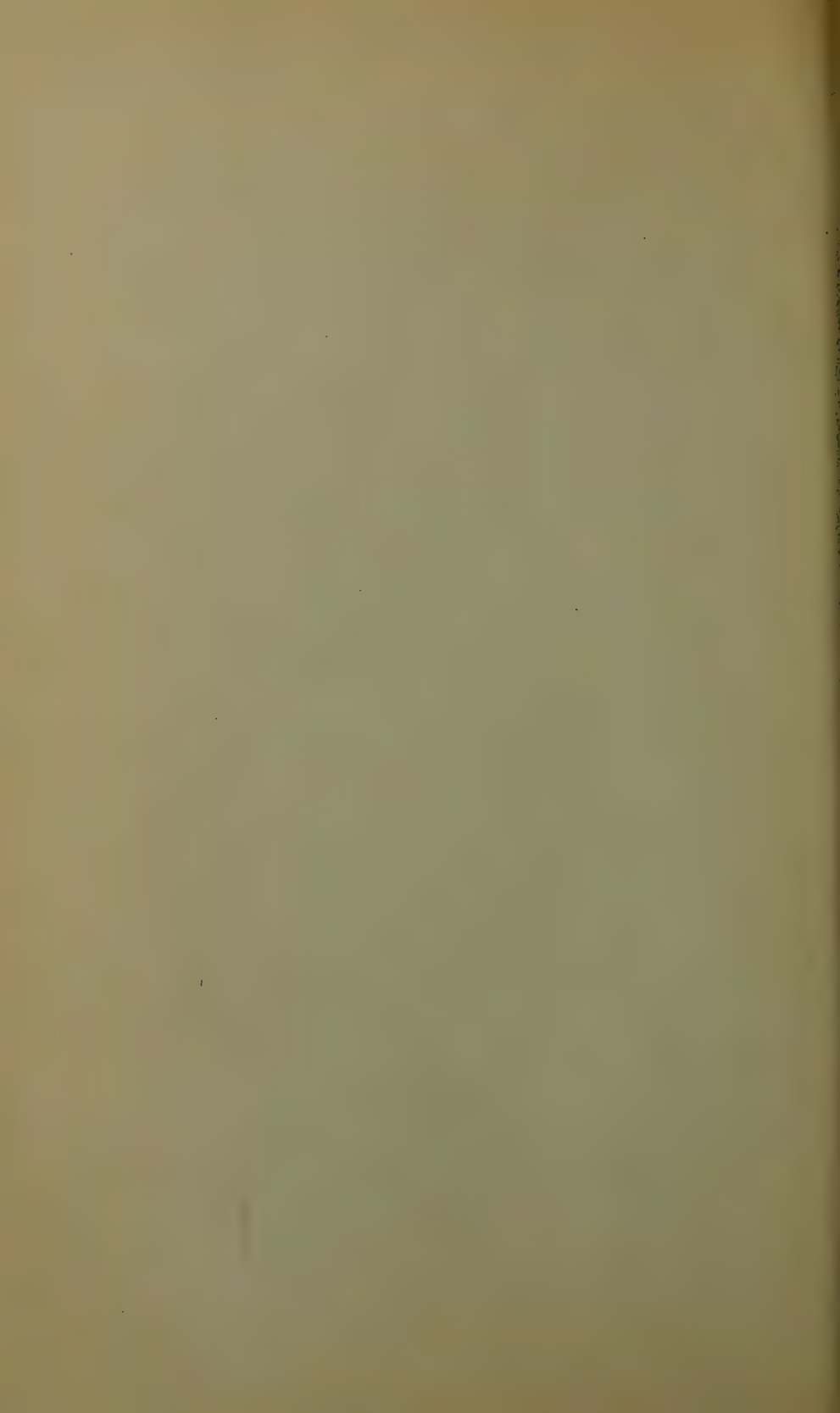
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FILED

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APR - 5 1945



United States
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District, et al,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE C. M. WHIPPLE

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**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

C. F. LYTTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation, UNITED
STATES FIDELITY AND GUARANTY COMPANY,
a Maryland corporation, and AMERICAN SURETY
COMPANY OF NEW YORK, a New York corporation,
vs. *Appellants,*

C. M. WHIPPLE, Deputy United States Compensation
Commissioner for the Fourteenth Compensation
District, et al,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE C. M. WHIPPLE

STATEMENT OF THE CASE

While the bare facts alleged at the opening of appellants' statement of the case might create the impression that William Earnest Nutt, for whose death a claim of compensation was filed pursuant to statute, was at the time of his accidental death en-

gaged in a truck ride, not incidental to his employment, nevertheless this appellee does not desire to controvert any implication thereby created because he believes it unnecessary as the facts upon which appellants specify error seem sufficiently clear and such implication is not advanced by their argument.

QUESTIONS PRESENTED BY THE APPEAL

Is there sufficient evidence in the record, upon which the compensation award and order affirming same are based, to support the findings of the deputy commissioner (a) that the death of William Earnest Nutt arose out of and in the course of his employment, and (b) that the death of the deceased was not occasioned solely by his intoxication?

PERTINENT STATUTES

The pertinent portions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U.S.C.A. 901 et seq), made applicable to persons employed at certain defense bases and under certain Public Works Contracts by the Act of August 16, 1941, as amended (55 Stat. 622, 42 U.S.C.A. 1651-1654), insofar as applicable to this appeal are as follows:

"Sec. 902—DEFINITIONS. WHEN USED IN THIS CHAPTER * * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment. * * *

"Sec. 903. COVERAGE. * * *

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

"Sec. 904. LIABILITY FOR COMPENSATION. * * *

(b) Compensation shall be payable irrespective of fault as a cause for the injury."

"Sec. 919. PROCEDURE IN RESPECT OF CLAIMS. * * *

(a) * * *, the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claims."

"Sec. 920. PRESUMPTIONS. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter. * * *

(c) That the injury was not occasioned solely by the intoxication of the injured employee. * * *

"Sec. 921. REVIEW OF COMPENSATION ORDERS. * * *

(b) If not in accordance with law, a compensa-

tion order may be suspended or set aside, in whole or in part, through injunction proceedings * * * instituted in the Federal district court * * *.”

ARGUMENT

A. THE COMPENSATION LAW.

1. *Policy and Purpose.*

The law recognizes the human element involved in the employment of labor. As was said in *Hartford Accident & Indemnity Co. v. Cardillo* (App. D.C. 1940), 112 F. (2d) 11, certiorari denied, 310 U.S. 649, at page 15 of the Federal Reporter:

“The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. The extension to their accidental (i.e., nonculpable, but injurious) behavior was not difficult. So with that of strangers, including assault by deranged persons, and their negligence intruding into the working environment. But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and cama-

raderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. 'Old Man River' is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment. (And at page 17):

* * *

"(11) The limitation, of course, is that the accumulated pressures must be attributable in substantial part to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating entirely outside the working relation and not substantially magnified by it. Whether such influences have annulling effect upon those of the environment ordinarily is the crucial issue. The difference generally is as to the applicable standard. It is not, as is frequently assumed, the law of 'independent, intervening agency' applied in tort cases. It cannot be prescribed in meticulous detail, but is set forth in the statute, not only in the broad presumptions created in favor of compensability, but more explicitly in the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by the claimant. The provision is: 'No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee or by the *willful intention of the employee to injure or kill himself or another.*' (Italics supplied)"

Certainly lengthy court actions were not contemplated in the administration of the Act.

“ * * * the purpose of the Act was to expedite the hearing of claims and granting of awards and to simplify as greatly as possible the procedure in such matters, so that the needy, the helpless, and the ignorant would receive financial aid promptly. The Act gives to the commissioner broad powers to accomplish this purpose.”

South Chicago Coal & Dock Co. vs. Bassett, (C.C.A. 7, 1939), 104 F. (2d) 522, 526, affirmed 309 U.S. 251.

2. *Rules of Construction.*

It has been generally held that the compensation law is a “remedial statute” in the public interest and should be liberally construed so that the purpose of its enactment by Congress for relief of an injured employee or his dependent family may be effected and that any doubt should be resolved in their favor, if possible, so as to avoid incongruous or harsh results.

See *Hartford Accident & Indemnity Co. v. Cardillo*, *supra*; *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414.

3. *Review by Court Within Statutory Limitations.*

(a) *Scope*

The rights, remedies and procedure under the

Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the court are those only which are expressly conferred by the Act.

Associated Indemity Corp. v. Marshall, (C.C.A. 9, 1934), 71 F. (2d) 235.

It is solely within the province of the deputy commissioner to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability, and the Act does not contemplate hearing *de novo* before the court as to facts. *Wilson & Co. v. Locke* (C.C.A. 2, 1931), 50 F. (2d) 81.

The scope of review seems now further settled by the Supreme Court in *Norton v. Warner Co.*, 321 U.S. 565, 568, where the court expressed its view:

"Sec. 19(a) of the Act gives the Deputy Commissioner 'full power and authority to hear and determine all questions in respect of' claims for compensation. And Sec. 21(b) gives the federal district courts power to suspend or set aside, in whole or in part, compensation orders if 'not in accordance with law.' In considering those provisions of the Act in the *Bassett* case, we held that the District Court was not warranted in setting aside such an order because the court would weigh or appraise the evidence differently. The duty of the District Court, we said, was to give

the award effect, 'if there was evidence to support it.' 309 U.S. at 258. And we stated that the findings of the Deputy Commissioner were conclusive even though the evidence permitted conflicting inferences. *Id.* p. 260. And see *Parker v. Motor Boat Sales*, 314 U.S. 244, 246. This statement of the finality to be accorded findings of the Deputy Commissioner under the Act was not new. It had been stated in substantially similar terms in *Voehl v. Indemnity Insurance Co.*, 288 U.S. 162, 166, and in *Del Vecchio v. Bowers*, 296 U.S. 280, 287. The rule fashioned by these cases followed the design of the Act of encouraging prompt and expeditious adjudication of claims arising under it. By giving a large degree of finality to administrative determinations, contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged. Thus it is that the judicial review conferred by Sec. 21 (b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. The error must be one of law, such as the misconstruction of a term of the Act.

(b) Burden of Proof and Presumptions.

The employer and insurance carrier, on a libel to set aside a compensation order, have the burden of showing that there was not sufficient evidence before the Deputy Commissioner to support the order complained of in the bill. The findings of fact of the Deputy Commissioner are presumed to be correct.

Burley Welding Works v. Lawson (C.C.A. 5, 1944), 141 F. (2d) 964, 966.

B. FINDINGS OF DEPUTY COMMISSIONER SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. *That Death of Employee Arose Out of and in Course of Employment.*

Taking the foregoing elements in reverse order, attention is called to the testimony of A. A. Lyon, Engineer and Superintendent of the Lytle-Green Construction Company, who testified in part (R. 57-58) as follows:

Int. 13: What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. On a Company truck to the place where they worked.

Int. 14: State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth between these different places; and if so, where these different places were all in June, 1942?

A. Yes, all within the area of activity in connection with the construction of the Big Delta Airport.

The testimony of William H. Green, foreman under whom the deceased worked on the day of his death, is to the same effect. (R. 67, 68, 73).

The testimony of Robert L. Nine, fellow-employee, is of similar effect as to the foregoing answers (R. 85, 86), and in addition, he testified:

Int. 15. On the day William Earnest Nutt was killed, did you go to the place of work where he was working with him, and if so, about what time of day did you go and what method of transportation did you use?

A. Yes, I went with him. We left the camp at 1:00 P. M. by truck.

Int. 16. Did one of your employers' trucks transport you from the camp to the place where that work was done that William Earnest Nutt and you and the others were doing on the afternoon of the day he was killed? A. Yes.

Int. 17 What kind of a day was it in reference to weather and what kind of a road was there between the camp and the place where you and William Earnest Nutt and the others were working?

A. Rainy day and the road was rough.

Int. 18. What were you and William Earnest Nutt and the others with you working at for your employer on the afternoon of the day William Earnest Nutt was killed?

A. We were loading electrical equipment on a barge.

Int. 19. How long did you and William Earnest Nutt work that afternoon or that day?

A. That afternoon we worked about five (5) hours.

Int. 20. What did you and William Earnest Nutt and the others do after your work was completed, and where did you go?

A. It was raining and we got wet so we went to Rika Wallen's roadhouse to dry out.

Int. 21. If you went to Rika's roadhouse, where was that in reference to the place where you and William Earnest Nutt were working, and did William Earnest Nutt also go to the same place?

A. Rika's roadhouse was about 500 feet from where we were working. Mr. Nutt also went there.

Int. 22. About what time of day did you go to that place? A. About 6:00 P. M.

Int. 23. State, if you know, whether or not the foreman over William Earnest Nutt and yourself, Mr. W. B. Green, was an employee of the same employer employing you and William Earnest Nutt on that afternoon, and also state, if you know, what the name of that employer was.

A. Yes, employer of all was Lytle & Green Construction Co.

Int. 24. State, if you know, whether William Earnest Nutt was instructed by W. B. Green as to how he was to return to the camp, and

state whether there was any conversation in your presence in reference to returning to the camp between W. B. Green and William Earnest Nutt or any others, and state what that conversation was.

- A. Yes. There were two trucks and Mr. Green told the ones that wanted to go on the first truck to do so, or take the second truck later. I did not hear any direct conversation between Mr. Green and Mr. Nutt. Mr. Green addressed the group of employees as a whole and left it up to us as to which truck to take back to camp.

DID THE INJURY RESULTING IN DEATH ARISE OUT OF THE EMPLOYMENT?

Harold William Johnston, who was riding in the back end of the truck with his brother Ray and the deceased, testified, in part (R. 48, 49), as follows:

- Q. Did you feel anything strike the car, or the car strike anything?
- A. No. The road was so rough.
- Q. What made the driver stop?
- A. He said he noticed it, but being in the back and we weren't watching the road like the driver was.
- Q. How fast do you think you were going?
- A. Not over 20 miles an hour I would say. 20 or 25 at the most.
- Q. Was the road rough?

A. Not in that particular spot.

Q. Did the accident happen on a curve or a straight of way?

A. We were just around the curve. There is a little straight stretch, about 200 yards.

Ötto Berg, the driver of the truck, stated in his testimony (R 44):

Q. How did you know there had been an accident?

A. That's the thing. I stopped that truck because I knew something happened. There was a jolt or a bounce or whatever you want to describe it as. Something — what it was I don't know. Something had to call my attention that something had gone wrong. It was just like the truck made a jolt like it had run over a rock and that's what called my attention to stopping the truck and of course I stopped it right there. It flashed through and I wondered if something was wrong. I watch my road pretty close.

James F. Brown and Walter Welchell, riding in the seat of the truck with Berg, each testified that he felt a jolt or bump at the time of the accident (R. 27, 52).

In considering the question of compensability of injuries incurred by an employee while on his way to or from his work, it might be well to briefly re-

view that aspect of compensation law.

In the beginning, when compensation laws were first enacted, the courts strictly and literally construed the phrase "arising out of and in the course of employment" and no injury was considered compensable unless it arose during the actual working hours and while the employee was actually at work. The courts, however, were not long in recognizing that such a strict construction of the law did not tend to achieve the purpose and intent of compensation laws. Gradually the courts came to the conclusion that an employee might still be "employed" even though his physical or manual work had ceased for the time being or had not begun and that the mere fact that an injury befell the employee at a moment when he was not performing manual labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment.

The question of entitlement to compensation for injuries sustained outside the working hours arises most frequently where the employee is being transported to and from work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment. A brief review of recent cases involving that question

will indicate the circumstances and factors which the courts have considered important.

In the case of *Southern States Mfg. Co. v. Wright*, 200 So. 375 (Fla. 1941), the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the court said:

“Generally it appears that the employer’s liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work.

“ * * * So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there*, arranged for the transportation of the employee on the employer’s truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such transportation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was an *incident to the employment and was exercised in the furtherance of the employment.*” (Italic supplied.)

In the case of *Taylor v. M. A. Gammino Construction Co.*, 18 Atl (2d) 400, 127 Conn. 528 (1941),

the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck in which to ride home. The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The court in affirming the award of compensation, said:

“An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work*; to do this it is not necessary that the employer should authorize the use of a particular means or method, although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment*, particularly where it is of benefit to him in furthering that employment.” (Italics supplied.)

In the case of *Chrysler v. Blue Arrow Transportation Lines*, 295 Mich. 606, 295 N. W. 331 (1940), the employee was engaged in driving a truck between Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the com-

pany. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured en route. The question was whether his injury was sustained in the course of his employment. The court, affirming the award to the employee, stated:

“Solution of the problem in the present case is aided by the test suggested in the Knopka case, ‘whether under the contract of employment, *construed in the light of all the attendant circumstances*, there is either an express or implied undertaking by the employer to provide the transportation.’

“In the case before us there was a clear undertaking on the part of the employer to furnish weekend transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town. (Italics supplied.)

In the case of *Rubeo v. Arthur McMullen Co.*, 193 Atl, 797 (N.J. 1937), the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee was to be provided with transportation from his home to the site of the work, but it was clearly shown that

the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the court said:

“When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delineation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, was *plainly within the contemplation of the parties*, at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would therefore be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction of the employer, into a practice *grounded in mutual convenience and advantage*. The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term ‘employment.’ *The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for.*” (Italics supplied.)

In the case of *Lamm v. Silver Falls Timber Co.*, 286 Pac. 527 (Oregon 1930), an employee of the lum-

ber company was injured while returning to camp from town where he had gone over the weekend. In deciding that the employee's injury came within the provisions of the workmen's compensation law the court said:

"From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ. His work did not begin until the following morning; but his employment began when the defendant accepted the plaintiff into its employ some months previously.

* * *

"We come now to the more specific question whether the injury arose out of and in the course of the employment. This Court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of the employment, is not to be determined by the precepts of the common law governing the relationship between master and servant; these ancient rules include the principles defining negligence, as assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these facts seek to serve leave no room for narrow technical constructions. * * *

"One of the purposes of the Workmen's Compen-

sation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. *Stark v. State Industrial Accident Commission*, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana Court in *Wirta v. North Butte Mining Co.*, 64 Mont. 279, 210 P. 332, 335, 30 A.L.R. 964; "The word "employment" as used in the Workmen's Compensation Act does not have reference alone to actual manual or physical labor, *but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do.* * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee.'

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours.

* * *

"Since employment is construed in its popular

signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter.

* * *

“A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen’s Compensation Acts is to grant compensation to an injured workman on account of his *status*. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. *When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation.* The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words ‘accident arising out of and in the course of his employment,’ but bore in mind this general purpose of the act, as revealed by its entire text.” (Italics supplied.)

In the case of *Ohmen v. Adams Bros.*, 109 Conn. 378, 146 Atl. 825, the court aptly indicated the conditions under which an employee is covered under the compensation law as follows:

“We have held that an injury to an employee is said to arise in the course of his employment at a place where he may reasonably be, and while he is fulfilling the duties of his employment, or

engaged in doing something incidental to it, or something which he is permitted by the employer to do for their mutual convenience. * * *

“We have also held: ‘An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or of the conditions under which it is carried on.’ ”

In the instant case the employer furnished the employees with transportation to and from jobs that were not within walking distance. There was no means of transportation in the vicinity other than by the employer's trucks. The transportation of the men to and from the jobs was an incident of the employment. If employees are within the protection of the compensation act while they are being transported by their employer between their homes and the place of work before or after the regular working hours, then *a priori* they are protected while they are being transported to and from the various job sites in the course of the employment. The present case is within the purview of the compensation law for the reason that the accident occurred while the employee was being transported in his employer's truck from the place where he had performed work to the camp fur-

nished by the employer. The transportation was an *incident* (or even a necessity) *of the employment*. While riding the truck he was as much in the course of his employment as though performing his manual labor. Even if one reading the testimony should conclude that the employee in some manner (through joviality, carelessness or similar conduct) contributed to the fall through his own *fault, negligence, or contributory negligence*, the claim is not barred. The statute takes care of this.

Appellants would substitute their scientific conclusion as to the impossibility of the deceased falling out of the truck and landing as described for the findings of the deputy commissioner (Brf. 24). However, appellants in their analysis do not consider the effect of the truck motion in rounding a curve (R. 49) or the loss of his equilibrium by the deceased while standing in the bed of the truck. It is possible the road was smooth at the place where the deceased landed and yet there is substantial evidence that it was rutty and rough (R. 39, 48). Since appellants defend upon the testimony of Ray Johnston, the only eye-witness to the departure of the deceased from the truck, his viewpoint should be considered to determine whether his fall was accidental, wilful or solely because of intoxication.

Ray Johnston testified (R. 11) that he (Nutt) raised up a foot as if to step out; that he had just before (R. 12) pushed him back and said "These are rough roads. You'll fall out; and didn't think anything more of it." In answer to question as to any reason for deceased so acting (R. 12) Ray Johnston answered: "No. Any more than just joking."

Questioned by the Jury (R. 13) he answered: "I don't think he figured on letting his foot go down there that far."

Appellee submits that if there is an inference to be drawn from all the testimony it is not the conclusion reached by appellants of departure from course of employment due to intoxicated condition (R. 27), but that deceased was a well being, who had indulged in beer and was in a joking mood and in his pranks he was caught off balance by the motion of the truck in which he was standing and when he put his foot out to brace himself instead of touching the side of the bed his foot went over the 10-12 inch top.

However, it should be reiterated that even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be re-weighed.

Norton v. Warner Co., supra; South Chicago Coal

& Dock Co. v. Bassett, 309 U. S. 251; *Parker v. Motor Boat Sales*, 314 U. S. 244; *Liberty Mutual Ins. Co. v. Gray* (C.C.A. 9, 1943), 137 F. (2d) 926; *Lowe v. Central R. Co. of New Jersey* (C.C.A. 3, 1940) 113 F. (2d) 413; *Henderson v. Pate Stevedoring Co., Inc.* (C.C.A. 5, 1943), 134 F. (2d) 440.

Appellants contend that if deceased had remained seated instead of standing up, the accident would not have occurred. The statute seems to have answered this contention by setting up two defenses only: That injury (1) is due solely to intoxication; and (2) is due solely to the willful intention of the employe to injure or kill himself or another.

It will be noted the second ground was not urged and the first ground was not found. (Sec. 903 (b)).

The statute further fortifies the position of claimant in that "compensation shall be payable irrespective of fault as the cause for the injury." (Sec. 904 (b)).

Fault or contributory negligence or negligence have consistently been rejected as defenses to claims; otherwise the statute would not remedy as it was enacted to do, the assumptions of the common law doctrine.

See *Hartford Accident & Indemnity Co. v. Cardillo, supra.*

2. *That Death of Employee was not Occasioned Solely by his Intoxication.*

The deputy commissioner found "that deceased was in a happy state of intoxication." He perhaps qualified his statement because reference to the testimony will show that no witness testified that deceased was intoxicated at the time of the accident. To say that the accident was due solely to intoxication is to say if deceased had been sober it could not have happened.

Appellants would attempt to argue that the "outrageous manner" in which the deceased acted was solely due to intoxication, and the riding in a bouncing truck over a rough crooked road could not be considered in any sense a related cause because others who were equally intoxicated, according to the testimony (R. 28, 40, 43, 48,), remained seated and were uninjured, and, therefore, his death was caused by his own careless conduct.

As appellee has heretofore pointed out, this conclusion was not justified by the testimony of Ray Johnston, or any other person, nor by the disclosed life and habits of the deceased. Furthermore, in view

of the presumption (38 U.S.C.A. Sec. 920 (c)) the burden was upon the employer and carrier to establish that decedent's death was occasioned solely by his intoxication.

The courts have uniformly affirmed a finding of the trier of the facts that the injury did not result solely from the intoxication of the employee where other contributing factors existed.

Department of Taxation & Finance v. De Parma, 3 N.Y.S. (2d) 120; *Southern Can Co. v. Sachs*, 131 Atl. 760; *Hahneman Hospital v. Industrial Board of Illinois*, 118 N.E. 767; *Griffiths & Sprague Stevedoring Co. v. Marshall*, 56 F. (2d) 665; *Maryland Casualty Co. v. Cardillo*, (App. D.C., 1939), 107 F. (2d) 959.

The Supreme Court of Arkansas, in *Elm Springs Canning Co. v. Sullins*, 180 S.W. (2d), 113, 116, a case also involving intoxication and falling from a truck under circumstances that in a fair and impartial mind would remain in doubt, gave the deceased the benefit of the doubt, in the following words:

“To assume that his intoxication was the sole cause of his falling from the truck and resultant death would be a presumption in the teeth of a statutory presumption to the contrary.”

Monahan, 61 F. Supp. 647; *Wilson & Co. v. Locke*, *supra*; *Calabrese v. Locke*, 56 F. (2d) 458; *Southern S. S. Co. v. Norton* (C.C.A. 3, 1939), 101 F. (2d) 825; *Groom v. Cardillo* (App. D.C. 1941), 119 F. (2d) 697; *Case v. Pillsbury* (C.C.A. 9, 1945), 148 F. (2d), 392; *Contractors v. Pillsbury* (C.C.A. 9, 1945), 150 F. (2d), 310; *Contractors v. Marshall* (C.C.A. 9, 1945), 151 F. (2d), 1007; *Crowell v. Benson*, 285 (U. S. 22; *South Chicago Coal & Dock Co. v. Bassett*, *supra*; *Parker v. Motor Boat Sales*, *supra*; *Norton v. Warner Co.*, *supra*.

The motion to dismiss raises only a question of law, and neither the statute nor any rule of admiralty procedure requires that the court make and enter findings to support the order of affirmance granting the motion.

CONCLUSION

For the foregoing reasons it is appellee's contention the decision below should be affirmed.

Respectfully submitted,

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No. 11237

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED
JUN 1945
PAUL P. JENSEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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District Court of the United States for the Northern
District of California, Northern Division

Civil No. 4906

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Defendant.

COMPLAINT

1. The United States of America, by Frank J. Hennessy, United States Attorney for the Northern District of California, brings this action under the Acts of Congress known as the Safety Appliance Acts (U. S. Code, title 45, sections 1 to 16, inclusive), against The Atchison, Topeka & Santa Fe Railway Company, a corporation organized and doing business under the laws of the State of Kansas, and having an office and place of business at Stockton, California, this action being brought upon suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [1*]

2. For a First Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

*Page numbering appearing at foot of page of original certified Transcript of Record

3. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, defendant on April 4, 1944, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: Wabash box car No. 46354.

4. That on said date defendant hauled said car in and about Stockton, California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end thereof was out of repair and inoperative, the uncoupling lever being disconnected from lock block of coupler on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by sections 2 and 8 of title 45 of the said U. S. Code.

5. Defendant is therefore liable to plaintiff in the sum of one hundred dollars. [2]

6. For a Second Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

7. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, defendant on April 6, 1944, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: Central of Georgia flat car No. 11138.

8. That on said date defendant hauled said car in and about Stockton, California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative, the uncoupling lever on said end of said car being fouled by the lading, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by sections 2 and 8 of title 45 of the said U. S. Code.

9. Defendant is therefore liable to plaintiff in the sum of one hundred dollars. [3]

10. For a Third Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

11. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, defendant on April 7, 1944, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: A. C. L. box car No. 18088.

12. That on said date defendant hauled said car in and about Stockton, California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative, the lock block of coupler on said end of said car being inoperable, thus necessitating a man or men going between the ends of the

cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by sections 2 and 8 of title 45 of the said U. S. Code.

13. Defendant is therefore liable to plaintiff in the sum of one hundred dollars. [4]

14. For a Fourth Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

15. That in violation of the provisions of the U. S. Code, title 45, sections 11 to 16, inclusive, and an order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, made pursuant thereto, defendant on April 7, 1944, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: P. RR box car No. 503205.

16. That on said date defendant hauled or used said car over its line of railroad in and about Stockton, California, within the jurisdiction of this Court, when the handhold on the right hand side of the "B" end of said car was bent in against car, and when said car was not equipped with end-handholds, one near each side of each end of car, with a minimum clearance of two inches, in accordance with the standards prescribed by said order of March 13, 1911.

IV.

Defendant denies the allegations contained in Paragraph V first cause of action of the complaint.

V.

Defendant admits allegations contained in Paragraph VI second cause of action of the complaint.

VI.

With respect to Paragraphs VII and VIII second cause of action of the complaint, defendant admits that Central of Georgia flat car No. 11138 was defective in the particulars alleged in said paragraphs; denies that defendant hauled said car on its line of railroad over a part of a highway of interstate commerce within the meaning of U. S. Code Title 45, Sections 1 to 10 on the 6th day of April, 1944 or at any time when in said condition and in this connection alleges that on the 6th day of April, 1944 at the hour of 8:50 a.m. the Central of Georgia flat car No. 11138 described in the complaint was placed on the interchange track between the yards of the Western Pacific Railroad Company and the defendant company by the Western Pacific Railroad Company connected to and in the middle of a string or train of cars; that at said time and place said car was discovered by defendant to be defective in the particulars described in the complaint and its receipt in interchange was refused; that in order to disconnect said car from the remaining cars in said string or train which were not defective, it was necessary to move said string or train of cars from the interchange track to the

switching yards at the defendant company, there to disconnect the same and redeliver it to the said interchange track; that on said date the said string or train of cars including the flat car herein described was moved to the switching yard of defendant company, disconnected from the other cars which were not defective and at the hour of 5:15 p.m. on April 6, 1944, the car described was redelivered to the interchange track between said carrier facilities; that the handling of the car described was purely incidental to disconnecting it from the remaining cars in the string or train in which it was connected or delivered by the Western Pacific Company. [9]

VII.

Denies allegations of Paragraph IX second cause of action of the complaint.

VIII.

Admits the allegations of Paragraph X third cause of action of the complaint.

IX.

With respect to Paragraph XI and XII third cause of action of the complaint, defendant admits that on April 7, 1944, A.C.L. Box Car No. 18088 was defective in the particular alleged in the complaint; denies that defendant hauled said car on its line of railroad over a part of a highway of interstate commerce within the meaning of U. S. Code Title 45, Section 1 to 10 inclusive on the 7th day of April, 1944, or at any time when said car was in such defective condition; alleges that the said car was

placed on the interchange track between the facilities of the Western Pacific Railroad and the defendant's railroad at the hour of 9:25 a.m. April 7, 1944 for interchange to defendant's line of railroad and connected with and in the middle of a string or train of cars which were not defective with the exception of the car mentioned in the 4th cause of action herein; that said car was at that time and place inspected by defendant company, its defective condition discovered and interchange refused; that it was necessary, in order to disconnect said car from the string or train of cars in which it was included, to move said string or train of cars from interchange track to the switching yards of defendant company; that on said day the said string or train of cars including the train described was moved to the switching yards of said defendant company, the car described disconnected from the remaining cars and said car redelivered to the interchange track between the Western Pacific Company and the defendant company, said redelivery taking place [10] at the hour of 7:00 p.m. on April 7, 1944; that the movement of said car was purely incidental to and necessary in disconnecting it from the other cars received from the connecting carrier.

X.

Denies the allegations contained in Paragraph XIII third cause of action of the complaint.

XI.

Admits the allegations contained in Paragraph XIV fourth cause of action of the complaint.

XII.

With respect to Paragraphs XV and XVI fourth cause of action of the complaint, defendant admits that "P" RR box car No. 50325 was defective in the particulars therein alleged; denies that defendant hauled or used said car on its line of railroad over a part of a highway of interstate commerce within the meaning of U. S. Code, Title 45 Sections 11 to 16 inclusive on the 7th day of April, 1944 or at any other time while in such defective condition; alleges that the said car was included within the string or train of cars placed on the interchange track between the Western Pacific Railroad Company and the defendant company on the 7th day of April, 1944 described in Paragraph IX of this answer; that the said car likewise was in the middle of the said string or train of cars; that the defective condition of said car was discovered by defendant company at the hour of 9:25 a.m. April 7, 1944 and was refused in interchange because of said defective condition; that in order to disconnect said car from the remaining cars in said train which were not defective, it was necessary to move said string or train of cars to the switching yards of defendant company and there disconnect the defective cars contained in said train; that on said day said string or said train of cars [11] was moved to the switching yards of defendant company and the car herein described was disconnected therefrom and redelivered to the interchange track at the hour of 7:00 p.m. on the 7th day of April, 1944; that the movement of said car was purely incidental to and neces-

sary in disconnecting it from the other cars of said string or train of cars.

XIII.

Denies allegations of Paragraph XVII fourth cause of action of complaint.

Wherefore, defendant prays judgment that plaintiff take nothing by his complaint and that defendant have judgment for its costs herein.

J. C. GIBSON

C. L. EWING

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed May 29, 1944. [12]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 7th day of November, 1944, before the Court, sitting without a jury, Thomas O'Hara, Esquire, Assistant United States Attorney, and James O. Tolbert, Esquire, Attorney for the Interstate Commerce Commission, appearing on behalf of plaintiff, and Charles L. Ewing, Esquire, appearing for the defendant, and evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its findings of fact, as follows:

FINDINGS OF FACT

FIRST CAUSE OF ACTION

I.

That defendant during all of the times mentioned in the Complaint was a common carrier engaged in interstate commerce by railroad in the State of California.

II.

That on or about the 4th day of April, 1944, Wabash box car No. 46354 was placed on the interchange track connecting the Southern Pacific Company's railway system with the defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Southern Pacific Company for delivery to the defendant; that when so placed on said interchange [14] track by the Southern Pacific Company, the said car was defective in that the coupling and uncoupling apparatus on the "B" end thereof was out of repair and inoperative, the uncoupling lever being disconnected from the lock block of the coupler on said end of said car.

III.

That when said car was placed on said interchange track by the Southern Pacific Company, the said car was coupled in a string or train of cars and between other cars which were not defective, and which nondefective cars were likewise placed on the interchange track for the purpose of delivery to the defendant company; that the manner in which the said defective car was coupled with the nondefective

cars was such that the nondefective cars could not be moved or used without the movement of the said Wabash box car No. 46354.

IV.

That, at said time and place, defendant inspected all of said cars including Wabash box car No. 46354, discovered the defective condition of the said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition.

V.

That Wabash boxcar No. 46354 was equipped with a type "E" coupler, top operated. The top operated toggle had the bottom "U" connection spread which allowed it to separate from the lock block. To repair this condition, it was necessary to remove the knuckle and the lock block and apply complete new uncoupling mechanism.

VI.

That the said Wabash boxcar No. 46354 was disconnected from the remaining nondefective cars by the defendant [15] and placed back on the interchange track for return to the Southern Pacific Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the nondefective cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately eight-tenths (8/10ths) of a mile distant, there disconnecting the said Wabash boxcar No. 46354 and shoving said de-

fective car back to the interchange track for return to the Southern Pacific Company.

VII.

That the movement of said car by defendant was the movement incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it to the Southern Pacific Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it to the Southern Pacific Company.

IX.

That the movement of said car was the most practical method of disconnecting said car from the nondefective cars and returning it to the Southern Pacific Company which could have been adopted, under operating conditions prevailing at said place on said date.

X.

That on the 4th and 5th days of April, 1944, at the time when the said Wabash boxcar No. 46354 was refused in interchange by defendant, the interchange track between the Southern Pacific Company and the defendant, as well as the main line track of defendant and the various other tracks in the vicinity of the said interchange track, were [16] congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been required to have repaired the defective Wabash boxcar No. 46354 on the interchange track; that while said repairs were being made all traffic on said track would have been interrupted; that such interruption would have seriously impeded traffic of both defendant and the Southern Pacific Company.

XII.

That the method adopted by defendant in disconnecting the said Wabash boxcar No. 46354 from the nondefective cars with which it was delivered and returning it to the Southern Pacific Company subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective Wabash boxcar No. 46354 on the interchange track.

SECOND CAUSE OF ACTION

I.

That defendant, during all of the times mentioned in the Complaint, was a common carrier engaged

in interstate commerce by railroad in the State of California. [17]

II.

That on or about the 6th day of April, 1944, Central of Georgia flatcar No. 11138 was placed on the interchange track connecting the Western Pacific Railroad Company's railway system with defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Western Pacific Railroad Company for delivery to defendant; that, when so placed on said interchange track by the Western Pacific Railroad Company, the said car was defective in that the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative; the uncoupling lever on said end of said car being fouled by the lading.

III.

That when said car was placed on said interchange track by the Western Pacific Railroad Company, the said car was coupled in a string or train of cars and between other cars which were not defective, and which nondefective cars were likewise placed on the interchange track for the purpose of delivery to the defendant company; that the manner in which the said defective car was coupled with the nondefective cars was such that the nondefective cars could not be moved or used without the movement of said Central of Georgia flatcar No. 11138.

IV.

That at said time and place defendant inspected

all of said cars including Central of Georgia flatcar No. 11138, discovered the defective condition of said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition. [18]

ATCHISON—Feb. 13—(folo White)

Watts

V.

That Central of Georgia flatcar No. 11138 was in the defective condition herein referred to because the load thereon had shifted so as to prevent the operation of the uncoupling lever on said car. To repair or correct this condition, it was necessary to shift the entire load on said car to clear the uncoupling lever.

VI.

That Central of Georgia flatcar No. 11138 was disconnected from the remaining nondefective cars by the defendant and placed back on the interchange track for return to the Western Pacific Railroad Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the nondefective cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately seven-tenths (7/10ths) of a mile distant, there disconnecting the said Central of Georgia flatcar No. 11138 and shoving said defective car back to the interchange track for return to the Western Pacific Railroad Company.

VII.

That the movement of said car by defendant was

the movement incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it to the Western Pacific Railroad Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it to the Western Pacific Railroad Company. [19]

IX.

That the movement of said car was the most practical method of disconnecting the said car from the nondefective cars and returning it to the Western Pacific Railroad Company which could have been adopted under operating conditions prevailing at said place on said date.

X.

That on the 6th day of April, 1944, at the time when the said Central of Georgia flatcar No. 11138 was refused in interchange by defendant, the interchange track between the Western Pacific Railroad Company and the defendant, as well as the main line track of defendant and the various other tracks in the vicinity of said interchange track, were congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been required to have repaired the defective Central of

Georgia flatcar No. 11138 on the interchange track; that while said repairs or corrections were being made all traffic on said track would have been interrupted; that such interruption would have seriously impeded traffic of both defendant and the Western Pacific Railroad Company.

XII.

That the method adopted by defendant in disconnecting said Central of Georgia flatcar No. 11138 from the nondefective cars with which it was delivered and returning it to the Southern Pacific Company subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the nondefective cars and its return would have created additional [20] hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective Central of Georgia flatcar No. 11138 on the interchange track.

THIRD CAUSE OF ACTION

I.

That defendant, during all of the times mentioned in the Complaint, was a common carrier engaged in interstate commerce by railroad in the State of California.

II.

That on or about the hour of 9:25 a.m., April 7, 1944, ACL boxcar No. 18088 was placed on the interchange track connecting the Western Pacific Railroad Company's railway system with the defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Western Pacific Railroad Company for delivery to defendant; that when so placed on said interchange track by the Western Pacific Railroad Company, the said car was defective in that the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative, the lock block of the coupler of the said end of said car being inoperative.

III.

That when said car was placed on said interchange track by the Western Pacific Railroad Company, the said car was coupled in a string or train of cars and between other cars which were not defective and which nondefective cars were likewise placed on the interchange track for the purpose of delivering to the defendant company; that the manner [21] in which the said defective car was coupled with the nondefective cars was such that the nondefective cars could not be moved or used without the movement of the said ACL boxcar No. 18088.

IV.

That at said time and place defendant inspected all of said cars, including ACL boxcar No. 18088,

discovered the defective condition of said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition.

V.

The ACL boxcar No. 18088 was a "D" top operated coupler with a No. 2 lock lift which had worn until the anti-creak feature stuck in the knuckle lock, thereby making it inoperative. In order to repair this condition, it was necessary to remove the knuckle, free it, put back lock lifter and apply a link at the top of the lock lifter to prevent it from dropping down and fouling in the knuckle lock.

VI.

That the said ACL boxcar No. 18088 was disconnected from the remaining nondefective cars by the defendant and placed back on the interchange track for return to the Western Pacific Railroad Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the nondefective cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately seven-tenths (7/10ths) of a mile distant, there disconnecting the ACL boxcar No. 18088 and shoving said defective car back to the interchange track for return to the Western Pacific Railroad Company.

VII.

That the movement of said car by defendant was the movement incidental to and necessary in dis-

connecting it from the remaining nondefective cars and returning it to the Western Pacific Railroad Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and its return to the Western Pacific Railroad Company.

IX.

That the movement of said ACL boxcar No. 18088 was the most practical method of disconnecting said car from the nondefective cars and returning it to the Western Pacific Railroad Company which could have been adopted under operating conditions prevailing at said place on said date.

X.

That on the 7th day of April, 1944, at the time when the said ACL boxcar No. 18088 was refused in interchange by defendant, the interchange track between the Western Pacific Railroad Company and the defendant, as well as the main line track of defendant and the various other tracks in the vicinity of said interchange track, were congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been required to have repaired the defective ACL boxcar No. 18088 on the interchange track; that while said repairs were being made all traffic on said track

would have been interrupted; that such interruption would have seriously [23] impeded traffic of both defendant and the Western Pacific Railroad Company.

XII.

That the method adopted by defendant in disconnecting said ACL boxcar No. 18088 from the nondefective cars with which it was delivered and returning it to the Western Pacific Railroad Company subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective ACL boxcar No. 18088 on said interchange track.

FOURTH CAUSE OF ACTION

I.

That defendant, all of the times mentioned in the Complaint, was a common carrier engaged in interstate commerce by railroad in the State of California.

II.

That on or about the 7th day of April, 1944, PRR

boxcar No. 503205 was placed on the interchange track connecting the Western Pacific Railroad Company's system with the defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Western Pacific for delivery to defendant and when so placed on said interchange track by the Western Pacific, the said car was defective in that the handhold on [24] the righthand side of the "B" end of said car was bent in against said car.

III.

That when said car was placed on said interchange track by the Western Pacific Railroad Company the said car was coupled in a string or train of cars and between other cars which were not defective, and which nondefective cars were likewise placed on the interchange track for the purpose of delivery to the defendant company; that the manner in which the said defective car was coupled with the nondefective cars was such that the nondefective cars could not be moved or used without the movement of the said PRR boxcar No. 503205.

IV.

That at said time and place defendant inspected all of said cars including PRR boxcar No. 503205, discovered the defective condition of the said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition.

V.

That PRR boxcar No. 503205 was in a defective

condition due to the fact that the handhold on the "B" end of the right side had been bent. In order to repair this appliance, it was necessary to straighten the handhold by the use of a bar.

VI.

That the said PRR boxcar No. 503205 was disconnected from the remaining nondefective cars by the defendant and placed back on the interchange track for return to the Western Pacific Railroad Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the nondefective [25] cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately seven-tenths (7/10ths) of a mile distant; there disconnecting the said PRR boxcar No. 503205 and shoving said defective car back to the interchange track for return to the Western Pacific Railroad Company.

VII.

That the movement of said car by defendant was the movement incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it to the Western Pacific Railroad Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it to the Western Pacific Railroad Company.

IX.

That the movement of said car was the most practical method of disconnecting said car from the nondefective cars which could have been adopted under operating conditions prevailing at said place or said time.

X.

That on the 7th day of April, 1944, at the time when the said PRR boxcar No. 503205 was refused in interchange by defendant, the interchange track between the Western Pacific Railroad Company and the defendant as well as the main line track of defendant and the various other tracks in the vicinity of the said interchange track were congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been [26] required to have repaired the defective PRR boxcar No. 503205 on the interchange track; that while said repairs were being made all traffic on said track would have been interrupted; that such interruption would have seriously impeded traffic of both defendant and the Western Pacific Railroad Company.

XII.

That the method adopted by defendant in disconnecting the said PRR boxcar No. 503205 from the nondefective cars with which it was delivered and returning it to the Western Pacific subjected its employees to no greater hazard than any other

method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective PRR boxcar No. 503205 on the interchange track.

GENERAL FINDING

The Court finds as a fact all facts which are hereinafter stated as conclusions of law.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court makes the following conclusions of law:

FIRST CAUSE OF ACTION

I.

That the movement of Wabash boxcar No. 46354 by defendant after its refusal in interchange for the purpose [27] of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the Court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it to the delivering carriers, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair said Wabash boxcar No. 46354, that duty resting with the delivering carrier, the Southern Pacific Company.

IV.

That defendant had no duty to repair said Wabash boxcar No. 46354 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Southern Pacific Company.

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, in connection with Wabash boxcar No. 46354 at the time mentioned in the Complaint, or at all.

VI.

That on the first cause of action defendant is entitled to judgment against plaintiff without costs.

SECOND CAUSE OF ACTION

I.

That the movement of Central of Georgia flatcar No. 11138 by defendant after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the Court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it to the delivering carrier, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair said Central of Georgia flatcar No. 11138, that duty resting with the delivering carrier, the Western Pacific Railroad Company.

IV.

That defendant had no duty to repair said Central of Georgia flatcar No. 11138 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Western Pacific Railroad Company.

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, in connection with Central of Georgia flatcar No. 11138 at the time mentioned in the Complaint, or at all. [29]

VI.

That on the second cause of action defendant is entitled to judgment against plaintiff without costs.

THIRD CAUSE OF ACTION

I.

That the movement of ACL boxcar No. 18088 by defendant after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the Court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it to the delivering carrier, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair said ACL

No. 18088, that duty resting with the delivering carrier, the Western Pacific Railroad Company.

IV.

That defendant had no duty to repair said ACL boxcar No. 18088 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Western Pacific Railroad Company.

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, [30] in connection with ACL boxcar No. 18088 at the time mentioned in the Complaint, or at all.

VI.

That on the third cause of action defendant is entitled to judgment against plaintiff without costs.

FOURTH CAUSE OF ACTION

I.

That the movement of PRR boxcar No. 503205 by defendant after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it

to the delivering carrier, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair such PRR boxcar No. 503205, that duty resting with the delivering carrier, the Western Pacific Railroad Company.

IV.

That defendant had no duty to repair said PRR boxcar No. 503205 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Western Pacific Railroad Company. [31]

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, in connection with PRR boxcar No. 503205 at the time mentioned in the Complaint, or at all.

VI.

That on the fourth cause of action defendant is entitled to judgment against plaintiff without costs.

Dated: This 6th day of August, 1945.

MARTIN I. WELSH

District Judge

[Endorsed]: Filed Aug. 6, 1945. [32]

District Court of the United States for District
of California, Northern Division

Civil No. 4906

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Defendant.

JUDGMENT

This cause having come on to be heard on the 7th day of November, 1945, and evidence having been presented by both parties, and the case having been submitted to the Court and the Court having entered herein its written Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by its Complaint or by any cause of action therein contained; that the action and each cause of action therein contained be dismissed on the merits, without costs.

Dated: August 6, 1945.

MARTIN I. WELSH

District Judge.

[Endorsed]: Filed Aug. 6, 1945. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the Plaintiff, United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals from the Judgment rendered on August 6, 1945 in favor of the Defendant in the above entitled case, to the Circuit Court of Appeals for the Ninth Circuit.

Dated: November 2, 1945.

FRANK J. HENNESSY

United States Attorney

By EMMET J. SEAWELL

Assistant U. S. Attorney

HARLAN M. THOMPSON

Assistant U. S. Attorney

[Endorsed]: Filed Nov. 2, 1945. [34]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO BE CONTAINED IN RECORD ON AP-
PEAL

Appellant designates the following portions of the record to be contained in the record on appeals in the above entitled action:

1. Complaint
2. Answer

3. Transcript of the evidence
4. Finding of Facts
5. Conclusions of Law
6. Judgment
7. Notice of Appeal
8. This designation
9. Designation by appellee of additional matters
to be included in the record.

Dated: November 12, 1945.

UNITED STATES OF
AMERICA

By THERON L. CAUDLE

Assistant Attorney General

FRANK J. HENNESSY

United States Attorney

By EMMET J. SEAWELL

Assistant United States

Attorney

[Endorsed]: Filed Jan. 8, 1946. Nunc pro tunc
as of Nov. 12, 1945. [35]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday the 7th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause.]

On motion of Emmet J. Seawell, Assistant U. S. Attorney, it is Ordered that the time to docket the record on appeal be extended 30 days from and after December 12, 1945, nunc pro tunc, that is, as of November 12, 1945. It is further Ordered that this order be entered nunc pro tunc, that is, as of December 12, 1945. [36]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday the 10th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause.]

On motion of Emmet J. Seawell, Esq., Assistant U. S. Attorney, it is Ordered that the appellant herein be and it is hereby allowed to and includ-

ing the 1st day of February, 1946, within which to file and docket its record on appeal in the Circuit Court of Appeals. [37]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 37 pages, numbered from 1 to 37, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. The Atchison, Topeka and Santa Fe Railway Company, No. 4906, as the same now remain on file and of record in this office; said record having been prepared pursuant to and in accordance with the Designation of Portions of Record to be contained in Record on Appeal, copy of which is embodied herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 21st day of January, A.D. 1946.

C. W. CALBREATH,

Clerk

By F. M. LAMPERT

Deputy Clerk. [38]

In the District of the United States in and for
the Northern District of California, Northern
Division.

No. 4906

Before Honorable Martin I. Welsh, Judge.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Defendant.

REPORTER'S TRANSCRIPT

Tuesday, November 7, 1944

Appearances: For the Government: Thomas
O'Hara, Esq., Assistant United States Attorney;
James O. Tolbert, Esq., Attorney for the Interstate
Commerce Commission. For the Defendant: C. L.
Ewing, Esq.

Tuesday, November 7, 1944, 10:00 o'clock A. M.

The Clerk: United States vs. Atchison, Topeka
& Santa Fe.

Mr. O'Hara: That is ready. At this time, may
it please the Court, I move the Court to permit the
association for the Government in the trial of this
case of Mr. James O. Tolbert, a member of the bar
of the District of Columbia, who is attorney for
the Interstate Commerce Commission.

The Court: So ordered.

Mr. Tolbert: If your Honor please, this is a civil action arising under what is known as the Federal Safe Appliance Act contained in Title 45 of U. S. Code, Sections 1 to 16.

The case contains four causes of action, and the Government alleges that on April 4th and April 6th and April 7th, 1944 the defendant railroad hauled four cars with defective safe appliances in and about Stockton, California when they had defective appliances on them. Three of these cars had the couplers so defective that they could not be operated without the man going in between the ends of the cars for that purpose, and in the fourth cause of action there was a defective handle on the end of the car, in that it was bent in against the car and was of no value as a handle on account of lack of clearance.

Section 2 of Title 45 of the Code provides that all cars must be equipped with couplers coupling automatically by impact [2*] and which may be uncoupled without men having to go in between the ends of the cars.

Section 4 of this same title of the Code requires that all cars be equipped with secure handles on the ends and sides of the car to afford greater security to the men coupling and uncoupling the cars, and one of these handles is the one that is bent.

Together with Mr. Ewing and Mr. O'Hara, we have an agreed statement of facts here that were drawn up, as I understand, by Mr. Ewing, and when we got together we found that there were

*Page numbering appearing at top of page of original Reporter's Transcript.

some things that we could not agree on, and the stipulation is rather marked up, but we still think that it is plain. Would you care to have the stipulation read now, or do you just want the substance of it?

The Court: Whatever you wish.

Mr. Tolbert: Well, I might just as well read it right now.

“The United States of America vs. The Atchison, Topeka and Santa Fe Railway Company, No. 4906.

“Agreed statement of facts.

“It is hereby agreed and stipulated, by and between the undersigned attorneys for plaintiff and the undersigned attorneys for defendant, that the following statement of facts are agreed and stipulated to be true and correct and may be considered by the Court as though offered in evidence [3] herein by either party hereto, save and except that the competency, relevancy, or materiality of any fact set forth in the following statement is not agreed to and either party may object to the consideration of any portion of said statement of facts by the Court upon the ground that any such fact is incompetent, irrelevant, or immaterial. Upon such objection, however, if the Court should determine any such fact to be relevant, competent, and material, despite such objection, then the Court may consider such fact with the same force and effect as though the same had been offered in evidence, objection taken and objection overruled.

“The facts so stipulated to are as follows, to wit:

I.

“That attached hereto and made a part of this statement of facts is a map with a legend thereon entitled ‘Part of Stockton, California’. That said map is drawn to a scale of one inch as the equivalent of one hundred feet and that said map accurately and in accordance with said scale depicts the layouts of the interchange track between the Southern Pacific Railroad and The Atchison, Topeka and Santa Fe Railway Company, hereinafter called Santa Fe, and the interchange track between the Western Pacific Railway and Santa Fe, and the Mormon yards of Santa Fe, all at Stockton, California, in the condition in which said tracks were laid out as they existed on the 7th day of April, 1944, and for at least [4] thirty days prior thereto.

II.

“That, at about the hour of 10:25 o’clock A.M. on April 4, 1944, Wabash boxcar 46354 was placed on the interchange track between the Southern Pacific Company’s system and the Santa Fe’s system in the City of Stockton, California, as shown on said map and said car was placed thereon by the Southern Pacific Company. That at said time and place the said car was defective in that the coupling and uncoupling apparatus on the (b) end thereof was out of repair and inoperative, the uncoupling lever being disconnected from lock block of coupler on said end of said car, thus necessitating a man or men going between the ends of the cars to couple

or uncouple them, and when said car was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars. That, when so placed on said interchange track by the Southern Pacific Company, said car was coupled between other cars which were not defective, which were also placed on said interchange track by the Southern Pacific Company in such fashion that the other non-defective cars on said interchange track could not be moved or used without the movement of the said Wabash boxcar 46354. That at said time and place, the Santa Fe inspected said cars, discovered the defective condition of the car heretofore [5] described, and refused to accept said car in that condition. That said car was disconnected upon its removal to the Santa Fe yards with the other cars and was at the hour of 3:00 o'clock A.M., April 5, 1944, redelivered to the Southern Pacific Company by placing the same on the interchange track. That the distance from the Southern Pacific and Santa Fe interchange track to the Santa Fe yard is approximately eight-tenths of a mile.

"That Wabash car 46354 was equipped with a type "E" coupler, top-operated. The top-operated toggle had the bottom "U" connection spread which allowed it to separate from the lock block. To repair this condition, it was necessary to remove the knuckle and the lock block and apply complete new uncoupling mechanism."

That takes care of the first cause of action.

“Paragraph III.

“That, on the 6th day of April, 1944, at the hour of 8:50 o'clock A.M., Central of Georgia flatcar No. 11138 was placed on the interchange track between the Western Pacific Railway system and the Santa Fe system, as shown on the map attached hereto, by the Western Pacific and connected to and in the middle of a string or train of cars. That, at said time and place, Santa Fe discovered the coupling and uncoupling apparatus on the ‘A’ and of said car was out of repair and not operative. The uncoupling lever on said end of said car being [6] fouled by the lading, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars. Upon discovery of this condition, the receipt of this car in interchange from the Western Pacific was refused. That on said date the said string or train of cars, including the car herein described, was moved to the Santa Fe switching yard, the defective car disconnected from the other cars which were not defective, and at the hour of 5:15 o'clock P.M., on April 6, 1944, the car described was redelivered to said interchange track. That the distance from the said Western Pacific interchange to the switch yards of the Santa Fe is approximately seven-tenths of a mile.

“That said Central of Georgia 11138 car was in the defective condition herein related because the

load thereon had shifted so as to prevent the operation of the uncoupling lever on said car. In order to repair or correct this condition, it was necessary to shift the entire load on said car to clear the uncoupling lever.

IV.

“That about the hour of 9:25 o’clock A.M., April 7, 1944, A.C.L. boxcar No. 18088 was placed on the interchange track between the Western Pacific Railroad and the Santa Fe [7] system in the City of Stockton, California, as shown on the map attached hereto, by the Western Pacific Railroad. That, at said time and place, said car was defective in that the coupling and uncoupling apparatus on the “A” end thereof was out of repair and inoperative, the lock block of coupler on said end of said car being inoperable thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers, coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars. That when so placed on said interchange track by the Western Pacific Railroad, said car was coupled between other cars which were not defective and which were also placed on said interchange track by the Western Pacific Railroad in such fashion that the other non-defective cars on said interchange track could not be moved or used without the movement of said defective car. That at said time and place Santa Fe inspected said cars, discovered the defective condition of the car here-

in mentioned, and refused to accept said car in interchange. That on said date the said string or train of cars, including the car herein described, was moved to the Santa Fe yard, the defective car disconnected from the other cars which were not defective, and at the hour of 7:00 o'clock P.M., on April 7, 1944, the defective car here described was delivered to said interchange [8] track. That the distance from the Western Pacific interchange track to the switch yards of the Santa Fe is approximately seven-tenths of a mile.

"That the A.C.L. Boxcar No. 18088 was a "D" top-operated coupler with a No. 2 lock lift which had worn until the anti-creep feature stuck in the knuckle lock thereby making it inoperative. In order to repair the same, it was necessary to remove the knuckle, free it, put back lock lifter, and apply a link at the top of the lock lifter to prevent it from dropping down and fouling in the knuckle lock.

V.

"That, on the 7th day of April, 1944, at about the hour of 9:25 o'clock A.M., P.R.R. boxcar No. 503205 was placed on the interchange track between the Western Pacific Railroad Company and the Santa Fe, as shown on the map attached hereto, by the Western Pacific and connected to and on the end of the string or train of cars. That, at said time and place, Santa Fe discovered that the handhold on the righthand side of the "B" end of said car was bent in against the car and that said car was therefore, not equipped with end-hand-holds,

one near each side of each end of car with a minimum clearance of two inches. Upon discovery of this condition, the receipt of this car in interchange from the Western Pacific was refused. That on said date the said string or train of cars including the car herein described, [9] was moved to the Santa Fe yard, the defective car disconnected from the other cars which were not defective and, at the hour of 7:00 o'clock P.M., on the 7th day of April, 1944, the car described was redelivered to said interchange track. That the distance from the said Western Pacific interchange to the yards of the Santa Fe is approximately seven-tenths of a mile.

“That the said P.R.R. box car No. 503205 was in the defective condition, herein related, due to the fact that the hand-hold on the “B” end of the right side had been bent. In order to repair this appliance, it was necessary to straighten the hand-hold by the use of a bar. It was possible to perform this repair on the interchange track.”

This is signed by the respective attorneys, and that, your Honor, we feel makes out a prima facie case for the Government, that the cars were admittedly defective, that they were received by this defendant in that condition, and that they were hauled to its own yard in violation of law, and that they were hauled back. And incidentally, this suit provides a penalty of \$100 for each and every violation.

I think that is the Government's prima facie case.

The Clerk: Does the Government rest at this time?

Mr. Tolbert: Yes.

The Clerk: May I have the stipulation?

Mr. Tolbert: Yes, I will file it. [10]

Mr. Ewing: May it please the Court, I think probably counsel is correct that at this stage of the proceedings there is nothing more that the Government could say. As a matter of fact, it is entirely possible that at this stage of the proceedings that there is nothing more that the Santa Fe can say, since the pertinent facts are pretty largely before the Court on this agreed statement. Particularly in view of the fact that it does show these track layouts on the map. But so that your Honor will know what we are driving at here in the beginning, we admit and, as was said last Saturday by President Roosevelt, we not only admit, but we assert that these cars were in a defective condition at the time these cars in the defective condition were put on the interchange track by the other railroad, and it is agreed that we refused to accept these cars in the interchange.

We moved these cars with the other cars to which they were connected down to our switching yards, the distances having been stated in the agreed statement, disconnected those cars which we refused and put them back on the interchange.

Now, it won't be any surprise, of course, to counsel, we have been in a way trying this case this morning in going over this agreed statement, we are relying on two cases. I will give your Honor a

little quotation from each. One of them is Baltimore & Ohio Railroad vs. United States and the other, a Ninth Circuit case, United States vs. Northern Pacific Railroad [11] Company in which our Ninth Circuit approves the holding in the Baltimore & Ohio case, and that holding is simply this: That a carrier who finds a car on interchange track offered to them in interchange that is in defective condition by virtue of the Safety Appliance Act is required, of course, to refuse to accept that car in interchange, refuse to take it on its own system, not to repair it or do anything else to it, but to refuse that car in interchange. And it has been stipulated here that we refused those cars in interchange.

Then this Court says in these cases that despite the fact that you refuse that car in interchange, you still are entitled to do such incidental handling of that car as may be necessary to disconnect it from the other cars with which it is connected and to reach the other cars which are not defective and which are on the interchange track.

We have here stipulated also that in each instance there were other cars which were not defective and which were coupled with this car on the interchange track, and our position is that the only handling which took place of these cars was that which as a practical proposition was incidental to disconnecting that car from the other cars on the track so that we could use the cars that were not defective and not thereby block this interchange track for an indefinite period of time while we

call on the other railroad to go in there and switch them out. Instead of that we took the entire cut of cars to our yard, disconnected [12] the defective ones from the non-defective ones and shoved the bad ones back on the track.

If there is anything in addition to this statement to present to sustain our position, it would be little expert testimony to explain the incidental handling of these defective cars, and, incidentally, as your Honor knows, I got in here late this morning, and if your Honor will permit I would like a little more time to consult with the expert witnesses before proceeding further, if it appears that is necessary in order to sustain the handling of these cars incidentally.

In other words we contend that the charge laid in this case is of a highly technical nature, and we have introduced two authorities sustaining the handling of them for that purpose, and since the part of the agreed statement in which I had asserted this handling was incidental is not now in the stipulation I would like to ask your Honor's indulgence to talk to my witnesses for a few minutes for the sole purpose of showing that this handling was simply incidental to the getting of the non-defective cars and using them in the track layout.

The Court: What time do you want?

Mr. Ewing: It is 11:20 now. I am sure we can finish this afternoon if your Honor would grant me until we take up after lunch.

The Court: That will be satisfactory. We will recess until 2:00 o'clock this afternoon. [13]

Mr. Ewing: I might hand your Honor these two quotations I referred to, and I will hand a copy to counsel (producing documents).

(Thereupon an adjournment was taken until 2:00 o'clock p.m. this date.) [14]

Tuesday, November 7, 1944, 2:00 o'clock P.M.

Afternoon Session

The Clerk: United States vs. Atchison, Topeka & Santa Fe.

Mr. Ewing: Your Honor, at this time we would like to call Mr. R. J. Kingston to the stand.

R. J. KINGSTON,

called for the defendant, sworn.

Direct Examination

Mr. Ewing: Q. Mr. Kingston, what is your occupation?

A. Chief Joint Inspector for the Santa Fe at Stockton.

Q. At Stockton, California?

A. Stockton, California.

Q. And how long have you been employed in that capacity? A. For 15 years.

Q. And have you always been in that capacity since you have worked with the Santa Fe?

A. No, sir. I had five years previous in the car shops.

(Testimony of R. J. Kingston.)

Q. In the car shops. Now, during this 15 years that you have been head car inspector, has your experience been in the vicinity of Stockton?

A. It has been on the Stockton interchange transfer.

Q. Will you just tell the Court briefly the nature of your [15] duties in this connection?

A. Well, my duties were to inspect cars passing from one railroad to another and carding them or setting them back, as the case may be, and make each road responsible for its damage.

Q. And in your capacity as an inspector, have you had occasion to observe the train movements in the vicinity of the Stockton Yards of the Santa Fe, and these interchange tracks with the Southern Pacific and the Santa Fe?

A. I have. The main line of the Santa Fe passed in front of the interchange office, as well as the Western Pacific and the Southern Pacific. The three of them junctioned there.

Q. And you have become familiar with train movements in that vicinity?

A. Oh, yes; we naturally would.

Q. Are you acquainted with the practices there in effect with reference to train movements in that vicinity?

A. Well, the train movements there — for instance, cars moving into the Western Pacific yard——

Q. I don't care for you to be specific about

(Testimony of R. J. Kingston.)

that, I just want to know if you are familiar with the handling of trains and cars in that area?

A. Yes, sir.

Q. You have observed them over a period of 15 years.

A. Yes.

Q. And you are familiar with the way these things are done and the way these things should be done?

A. Yes, sir.

Mr. Ewing: Now, if your Honor please, we would like to [16] refer in connection with this witness to the map which has been made a part of this agreed statement of facts.

I don't believe that was marked in evidence. I think that it is in evidence by agreement, but perhaps for the purposes of identification it should be marked in some fashion. Should we call it Exhibit 1?

The Clerk: Your exhibit, sir?

Mr. Ewing: Well, I think it is a joint exhibit, is it not?

Mr. Tolbert: Yes.

(The document referred to was marked Joint Exhibit #1.)

Mr. O'Hara: Do you wish to put it on the board?

Mr. Ewing: It is too small for it to be of benefit to the Court by putting it at some distance. It may be possible for the witness to look at one copy while your Honor looks at the other, or possibly have the witness use the same copy up on your Honor's bench there. Which would the Court prefer? Per-

(Testimony of R. J. Kingston.)

haps if you would take a look at this, your Honor?

(Exhibiting document to the Court.)

The witness' testimony would hardly be intelligible unless he could point out on the map these matters that we are about to discuss here.

The Court: I suggest you put it on the blackboard.

Mr. Ewing: Would your Honor be able to see it from there? [17]

The Court: No, I will go down and look at it.

Mr. Ewing: Oh, all right, fine.

(The map was placed upon the blackboard.)

Mr. Ewing: Q. Now, Mr. Kingston, if you will step down from the stand here, I would like to have you point out first on this map, if you will, the location of the interchange track with the Southern Pacific as it existed here in April of 1944.

A. Well, it left the Santa Fe main line at this point here, followed this track around here, and went up this street up here for about four more blocks (indicating on map).

Q. Now the point where you are indicating is diagonally across a block shown on the map numbered 284 and then up along the side of a block numbered 278?

A. 278, yes sir, across Hazelton Avenue here.

Q. Now that is the interchange track with the Southern Pacific. Will you point out where the main line of the Santa Fe runs in that vicinity?

A. The Santa Fe main line runs right across here (indicating on map).

(Testimony of R. J. Kingston.)

Q. That is at the base of the square marked 285?

A. Yes, sir. Right there (indicating).

Q. And the interchange track takes off there between 284 and 285? A. Yes, sir.

Q. Now will you point out where the main line runs to the Mormon Yards of the Santa Fe?

A. The main line follows right on through there (indicating). That would be the main [18] line right there (indicating).

Q. The main line then continues east along the base of these squares numbered 285, 286, 287 and 288 until it enters these switching yards or tracks which are designated "Mormon" in the space above, is that correct? A. That is correct.

Q. All right. Now, Mr. Kingston, with reference to cars on the interchange track with the Southern Pacific, at the point that you have indicated on this map, in order to switch out defective cars which may have been in any cut on that track, what was the practical way to remove those defective cars?

A. Well, if the car was defective any place before this track here (indicating), the way they would do it—have to do it would be to come down over here (indicating)—there is no switch at all until they arrive down here at the crossing (indicating), in other words of the Mormon Yard #1 track. That is where they take the interchange cars up into the yard.

Q. Then if I understand you correctly, in order to disconnect a car which was in a cut in this vicinity the practical way would be to take the cut up to

(Testimony of R. J. Kingston.)

the Mormon yard and there disconnect it and return it, is that correct? A. Yes.

Q. Can you explain to the Court why it would be impractical to handle it otherwise?

A. Well, there is no possible way that they can make the switch. If they had it in the cut they would have to take it on out, because there is a spur in here (indicating on map)— [19]

Q. Suppose we take it spot by spot. I notice here right at the juncture of the interchange track with the main line of the Santa Fe, right at the base of the square numbered 285, that there is a switch where the interchange track takes off from the Santa Fe. Why, if it is a fact, is it impossible to switch cars at that point?

A. That is on the main line of the Santa Fe. The switch there is governed by the tower. That switch cannot possibly be thrown. In other words, to switch it has to go on through. It cannot be done on the main line. This is the same way (indicating).

Q. Now you are indicating another switch which appears over here under square 286 (indicating)?

A. Yes.

Q. Now why would it not be practical to disconnect the cars at that point?

A. At that point the switch also is governed by the inter-locking tower. When the main line is lined up, that switch is closed and that is also locked and you cannot possibly go on that spur when the Santa Fe main line is lined up.

Q. Now referring to the interchange track which

(Testimony of R. J. Kingston.)

is back up here between squares 277 and 278, why would it not have been practical as an operating matter to have disconnected the cars up in that vicinity? A. You mean leave the car?

Q. To have dropped out the defective car up in that vicinity.

A. There is no place up in there for the Santa Fe to perform that operation. That is a single track. There is only one [20] track they have available for their interchange, and there are no tracks in there to perform switching operations.

Q. Now at this time, last April, 1941—your Honor may take judicial notice of this—was the traffic—the movement of passenger and freight traffic over the main line track of the Santa Fe in this vicinity heavy or light?

A. Well, the traffic over the main line is heavy, that is, across the main line there.

Q. Then even assuming that it were possible to have used either of these switches that come out onto the main line of the Santa Fe, what effect would that have had on main line traffic if those switches had been used or if they could have been used?

A. They would delay the traffic not only on the Santa Fe but on the Western Pacific. When you cross the Western Pacific main line here, the interlocking plant ties that up also. It would no doubt delay the traffic both east and west on both roads.

Q. Now, Mr. Kingston, with reference to this Southern Pacific transfer track, will you point out

(Testimony of R. J. Kingston.)

where the Western Pacific transfer track is on this map?

A. It follows right along the Western Pacific main line and curves along here into the Santa Fe (indicating on map).

Q. At the point where it makes the curve and into the Santa Fe main line, it is approximately diagonally across the block numbered 291 on the map?

A. 291, yes.

Q. Now is that transfer there a single track or double track? [21]

A. It is a double track, one receiving and one waiting.

Q. Do you know what the capacity of those tracks are?

A. They are 40 cars.

Q. 40 cars?

A. 40 cars each.

Q. Is that the normal number of cars that are offered in exchange going in each direction?

A. That is the normal amount.

Q. And I suppose in April with conditions like they were normally 40 car cuts were filled out in order to offer them in interchange?

A. That is correct.

Q. Now will you explain to the court what movement took place in putting cars on to this Western Pacific interchange track? By that I mean were these cars shoved on or pulled on or both, or how were they handled?

A. Well, they were both. When the Santa Fe would deliver, they would have the W.P. cut of cars in their yard, they would hook the switch engine

(Testimony of R. J. Kingston.)

onto the cars and come down here right around the interchange and most of the time the transfer engine would pull them, and the W.P. would do likewise. The Santa Fe would pull down here and shove this Western Pacific cut out, and the Western Pacific, of course, would likewise.

Q. Now to get it straight, as I understand you, the only type of movement would be for the Santa Fe to put their engine at the head or lead end of a string of 40 cars, pull it on the Western Pacific interchange, then drop the engine off the front end, [22] switch it off of that track, back it onto the other interchange and shove against—behind the cut of cars which had been left there by the Western Pacific and push it on into the Santa Fe yards?

A. That is correct.

Q. Now assuming that type of movement, would it have been possible to have disconnected a defective car which was in that cut of cars while that car was on the interchange track?

A. No, sir. In making that move you can see it would be impossible—there is no way that they could cut that car out. They would have to take it on out here——

Q. You say it would be impossible. Can you tell us why it would be impossible?

A. There is no way—they are shoving this cut of cars—there is no switch or any track here where the car could be set out.

Q. That is because the other track is full of cars that were just brought in, is that the situation?

(Testimony of R. J. Kingston.)

A. In this case it wouldn't make any difference, they couldn't set it out anyway.

Q. But assuming that they could set it out, the cars that the Santa Fe had pulled in on the track would completely occupy one of the interchange tracks?

A. Oh, yes.

Q. And then, of course, the Western Pacific cars would occupy the other interchange track?

A. That is correct.

Q. So there could be no switching between them where they were full of cars, is that the situation?

A. That is the way it is.

Q. Now assume the other type of movement. Assume that instead of pulling this cut of cars on the interchange and shoving the Western Pacific cars out of the interchange that the Santa Fe shoved in their cut of cars and pulled out the Western Pacific cars. Would it have been practical to have dropped out any defective cars from such a cut before arriving back at the Mormon yards of the Santa Fe? In your opinion would it have been or not?

A. Well, if they pull——

Q. First just answer that and then you may explain, if you please.

A. Yes.

Q. It would have been?

A. Possible?

Q. Practical.

A. Practical? If this track was full it would not. There would be no place to put them, because if this track was full—well, if they switch them out, they would have to switch across this street crossing

(Testimony of R. J. Kingston.)

and this street crossing and block the Santa Fe main line crossing (indicating on diagram).

Q. Then if I understand you, if the interchange track were full of cars it would be impossible to disconnect them? A. Yes, sir, it would be.

Q. And if it weren't full, it would be impractical for these various reasons? A. Yes, sir.

Q. And those reasons are again, sir?

A. Well, your switch is right there, right at the edge of this [24] street crossing.

Q. You are referring to a point just above block 307?

A. 307. This is Pilgrim Street (indicating on diagram), the main street for this part of town. There is traffic on that street and they would block that street to do any switching.

Q. And would that create a hazard to the public?

A. Well it would, yes, because there is no protection there except flagging by trainmen.

Q. Now the next point back there——

A. Well, there is the other street.

Q. What street is that?

A. There is Ophir Street.

Q. Switching in that vicinity would also block that street? A. Yes, sir.

Q. What, if any, effect would switching movements there have on the main line trunk of the Santa Fe?

A. The main line switch from the Santa Fe to their yards is located just on the other side of Ophir Street, and that switch-over is used for passage of

(Testimony of R. J. Kingston.)

both east and west bound main line trains, and if they got up there it would block them in their movements.

Q. Now tell me, Mr. Kingston, would there have been any difference in the amount of work by the men who were handling these movements—any difference in the amount of handling of these cars if they could have been disconnected right at the switch [25] onto the interchange as compared with the disconnection back in the Mormon yards?

A. I don't just get that.

Q. Perhaps I didn't make myself plain. To switch one of these defective cars out of the string or cut of cars requires certain switching movements. Does that require the same number of switching movements whether it be done up on a switch at the interchange or whether it be done back in the Mormon Yards?

A. The same amount of movements would be taken to switch at either place.

Q. So that the men working those cars would do the same thing whether they did it on the interchange or back in the Mormon yards?

A. That is right.

Mr. Ewing: I think you may examine.

Cross Examination

Mr. Tolbert: Q. Mr. Kingston, I want to refer to this map again to clear up a few little points. I believe you testified with respect to this Southern Pacific interchange, that is, the one in block 284, as I understand, that track is used by the Southern

(Testimony of R. J. Kingston.)

Pacific to deliver cars to the Santa Fe and also used by the Santa Fe to deliver cars to the Southern Pacific. That is correct? A. Yes, sir.

Q. It is what you call a joint interchange track?

A. Yes, sir.

Q. And I believe you testified that these cuts of cars sometimes are pushed over there and sometimes pulled over there? [26]

A. Not this track. They are always pushed.

Mr. Ewing: You are referring to the Southern Pacific?

Mr. Tolbert: I am referring to the Southern Pacific, the first cause of action.

Q. I believe you also testified that there was no place along here that you could switch these cars out, that it was necessary to haul them all the way to the Mormon yard, is that correct?

A. At this specified point here (indicating).

Q. These two points (indicating)?

A. That is right.

Q. And the reason you say they can't be switched out is because this switch between blocks 285 and 291 is controlled from the interlocking tower?

A. From the interlocking tower, yes.

Q. And the same is true of this other switch—where is that?

A. Right here (indicating on diagram).

Q. At the bottom of 286 at the right hand corner, I believe? A. Yes.

Q. Then if that be true, how can the Santa Fe use this line at all if it can't use those switches?

(Testimony of R. J. Kingston.)

A. Those switches are double switches. The main line is split there and there is a derail, so those two switches are locked together. If the Santa Fe main line is lined up, there is a derail here (indicating), and when this switch is open to go to the spur track, they are locked (indicating).

Q. Perhaps you didn't understand my question. You can get a [27] movement from this first switch on to the main line by having the towerman throw the switch, is that right?

A. Not unless he goes away back here.

Q. Well, it isn't impossible to get cars back there by having the towerman throw that switch, is it?

A. It is impossible; he can't throw that switch.

Q. The towerman?

A. Not unless the train moved back to here (indicating), the train must move back to here (indicating).

Q. If the train does move back to this second switch between 287 and 318, then the towerman can throw the switch, is that correct?

A. If it moves over there, that automatically relieves the towerman and he can throw that switch.

Q. And they can be set back here (indicating) without being hauled over to the Mormon yards?

A. Well, they can't set back within this tower, they have to be moved over across this tower.

Q. But they can be set back there a sufficient length to cut the bad order car out, and then go on with the good order cars, is that correct?

A. That wouldn't work at all, because this here

(Testimony of R. J. Kingston.)

interlocking tower—there is one, two three— there is three streets you have to set them out; you would have to set them away out here (indicating on diagram).

Q. That is about two blocks?

A. Two and a half blocks.

Q. Now, the interchange, I see on this interchange track at 284, when you get up here in the upper right hand corner there [28] is another track (indicating on diagram). Why can't you set the cars out there?

A. That track is a joint track with the California Packing Corporation. Many times the California Packing Corporation have delivery of cars that come to them there to be loaded, empty boxes; sometimes it is used for an interchange track, but not always.

Q. But what I am getting at is that track could have been used for the necessary switching to disengage this defective car from the other cars, could it not?

A. In some cases it could, and in some cases not. If it was full——

Q. In respect to these violations that occurred, as you recall, on April 6th and 7th, you have no recollection at this time as to whether at that time those tracks were full or not, do you?

A. No, sir, I haven't. I couldn't tell you.

Q. Now what would happen if the Southern Pacific brings this cut of cars over there and you inspect it and you find a defective car in there and

(Testimony of R. J. Kingston.)

you bad-order it, you would leave the whole cut there and say to the Southern Pacific, "Come and get it, we won't touch it?"

Mr. Ewing: Just a moment. If I understand that question right, I don't believe it has any materiality. That is a matter of law, isn't it?

Mr. Tolbert: No. The point I am trying to bring out is that since they discovered that car was defective and under [29] the law they can't move it for purpose of repair, knowing that why did they haul it over to their yard, why didn't they leave it there? That is the point.

Q. That could have been done, couldn't it?

A. Well——

Q. I am not trying to confuse you.

A. I am confused there.

Q. Well now, let's get it straightened out. Take this particular case, this first count. They came over there with a cut of cars, I don't know how many there was, but you inspected them and you found one of the cars defective. That is correct?

A. That is correct.

Q. And you knew you didn't want it, but instead of leaving it there the Santa Fe comes along and hauls it over there (indicating on diagram). My question is why wasn't it just left there, the whole outfit? A. My duties——

Mr. Ewing: Just answer that, just tell him why you didn't leave that particular car.

Mr. Tolbert: I mean the whole cut of cars.

Mr. Ewing: All right, the whole cut of cars.

(Testimony of R. J. Kingston.)

A. Of course my position doesn't say what they shall move and what they shan't move. What I did was find the car, card the car, and set it back to the Southern Pacific.

Mr. Tolbert: Q. And your job is done?

A. The report is in. [30]

Q. That is right. Now that has been about six months ago. Do you still do the same things with those cars when they are delivered to you by the Southern Pacific as you did before?

Mr. Ewing: We object to that, if the Court please. We are not charged with what we are doing now.

The Court: The objection is sustained.

Mr. Tolbert: All right. Exception.

Q. Now you spoke about bringing these cars down on the main line, coming across Pilgram Street and South Ophir Street, that it would be a hazard to the traffic to have those cars pulled down there, as I understand you?

A. Well, it would be a hazard to the traffic.

Q. Aren't those crossings protected by wig-wag signals?

A. Not on a transfer operation. They are on main line moves.

Q. In making this movement from the S. P. interchange over to the Mormon, don't you use the main line?

A. Excuse me. I thought you meant the Western Pacific.

Q. I am talking about the Southern Pacific.

(Testimony of R. J. Kingston.)

A. Yes, sir. On those moves the wig-wags move.

Q. So there would be no more hazard for this cut of cars to occupy the crossings than it would be for any other cut of cars or any other trains?

A. No.

Q. And it is often necessary to occupy crossings. That is what goes with railroading. Now suppose we take these deliveries from the Western Pacific to the Santa Fe. Now you testified [31] that they came in here (indicating on diagram),—is that Union Street? A. Yes, sir.

Q. And the interchange track cuts across diagonally over to Block 291. Now how does the Western Pacific bring in their cars?

A. Well, they bring them two ways. They push them in and they tow them in—pull them in.

Q. Assuming they pull a cut of cars in, that means the engine is on the head, how does it get back?

A. It comes up to this switch (indicating on diagram) and goes back here (indicating on diagram).

Q. Is that switch—that is a switch between 286 and 291—is that controlled by an interlocker?

A. No; that is hand thrown.

Q. Then if the locomotive can come back on this other track (indicating on diagram) that means that track is open, does it not?

A. It is open if there are no cars there.

Q. If there are cars on it, can the locomotive get back?

(Testimony of R. J. Kingston.)

A. You mean on the Western Pacific?

Q. I mean on the Western Pacific, yes.

A. If there are cars on it going to the Western Pacific, the Western Pacific pushes them off.

Q. Then if the locomotive is on that track then that track could also be used to switch out bad order cars, could it not?

A. Providing there is no cars on it.

Mr. Ewing: Did you say the Western Pacific?

Mr. Tolbert: No, the Santa Fe. In other words, to make it clear, if the Western Pacific locomotive can use that track for the purpose of getting back, why can't the Santa Fe locomotive use that track to switch out the bad order cars?

A. Well, in many cases the Santa Fe would fill this track from one end to the other, and if the Santa Fe comes in there and has two bad order cars, there would be no place to put them.

Q. Of course, at this late day you don't know whether that track was filled or not, do you?

A. No, sir, I don't.

Q. Now this car that we received from the Southern Pacific, and the three cars that were received from the Western Pacific—perhaps I should ask you this question later on—it is your sole job to inspect the cars and to put on the bad order tags, and then if they move them, that is somebody else's job, isn't it?

A. That is right.

Q. Now are you familiar with the defects on these particular cars, just what they were?

(Testimony of R. J. Kingston.)

A. I believe so.

Q. And you are the joint inspector and you have had quite a bit of experience in supervising the making of repairs, have you not?

A. Yes, sir.

Q. Now in order to make these repairs, is that much of a job?

Mr. Ewing: Now, just one moment. If the Court please, I think this is something I ought to call to your attention, if your Honor wants to hear it, and perhaps we will later—it will be satisfactory with me—but under this stipulation we [33] have reserved the right to object to such portion of it as might not be material. Counsel's question here raises that question of the possibility of repair which is also mentioned in the stipulation of facts to some extent. Now we contend that whether or not these cars could have been repaired at the interchange track is immaterial in this proceeding for the reason that we refused these cars in interchange, as we had the right to do; that the sole duty of repairing these cars rested on these two railroads who wrongfully offered those cars in interchange to us, and that since the duty never devolved upon us and could not devolve upon us to repair the cars, that it is immaterial as to how easy or how hard it may have been to make these particular repairs.

Our whole position is that we refused these cars and that we made only the movements that were practical and necessary to get the defective cars

(Testimony of R. J. Kingston.)

disconnected from the non-defective cars and get the non-defective cars off the interchange track, and that we pushed these cars that were defective back to where they had been offered to us, to the railroad whose duty it was to take care of them, to take care of those necessary repairs.

Understand, your Honor, that it was a violation, as counsel knows, for those cars to have been offered to us in the first place.

How easy or how hard it was to repair those cars is not pertinent in this case. The only question before us now is did [34] we move those cars more than was necessary or practical in order to separate them from the non-defective cars which we had a right to pull off the interchange.

Mr. Tolbert: If your Honor please, the Government's position in that respect is that cars with defective safety appliances cannot be moved at all. There is a proviso that says that cars may be moved for purposes of repair, but that move for purposes of repair is limited to the carrier upon whose line or railroad the car became defective.

Manifestly these cars did not become defective upon the line of the Santa Fe; they became defective before the Santa Fe received them. And the requirements of the law are absolute. The purpose of the law is not to collect a penalty, but the purpose of the law is to provide protection to the employees and the traveling public.

From our experience we hope to show that these defects were of such a nature that it was not neces-

(Testimony of R. J. Kingston.)

sary to move them at all—understand, this carrier was not moving them for the purpose of repair; counsel is right when he said they were moving them in order to cut them out and set them back—but having in mind the purpose of the law, the remedial features of the law, that instead of making these minor repairs—that is, the repairs are minor, but the defects carry with them potential danger, that instead of hauling these cars all the way down to the Mormon Yard—I suggest that is somewhere between a half [35] to three quarters of a mile; it is in the stipulation—exposing that crew to the dangers incident to these defective cars—three of them are couplers, and we all know of old railroadmen, a lot of them had fingers cut off and hands cut off and some of them even had heads cut off—they subjected these employees to the dangers of hauling the cars down to the Mormon Yard, and the stipulation will show that these cars were down there some few hours—I think the longest period was 24 hours—anyway from 12 to 14 hours—I don't know what was done with them while they were down there, probably the necessary switching, and then they were hauled back, and there were two separate and distinct movements, two separate and distinct train crews, and we propose to show that if this carrier had in mind the purpose of the law and the protection of its employess that defects of this character could have been repaired there, and that was the purpose of the question that I had in mind, which was over-

(Testimony of R. J. Kingston.)

ruled a few moments ago, to show that perhaps they are not doing the same thing today as they did six months ago.

Mr. Ewing: Well, if it please the Court, counsel has gone into it, and I think it is perfectly all right to go into it so the Court will know where we stand on this matter. We are just as cognizant as counsel is of the reason for the safety appliance law, and I think your Honor can see from the testimony of this witness that we are bringing out that thing exactly. But the safety appliance law, as counsel says, doesn't in the [36] first place upon us the duty or obligation of repairing cars which are received in interchange in a defective condition. As a matter of fact, if I did at this time in this stipulation agree that we removed those cars or touched those cars for the purpose of repairing those cars, I would have to confess judgment in this case, because the law does not give us the right to take cars from another carrier and repair them. The law gives us just one right, to refuse those cars, but as a practical proposition—the courts have said, as counsel agrees, as a practical proposition you are entitled to take those cars off of the non-defective cars, otherwise you would have, as counsel here a moment ago suggested, leaving the whole cut of cars there, you would have 39 non-defective cars blocking an interchange track under conditions that are now prevailing so as to prevent the mere switching movement involved in removing one defective car.

(Testimony of R. J. Kingston.)

Now counsel says we subjected this crew to a possible hazard in taking this car out. We subjected this crew to no hazard other than would be the hazard involved in removing the one defective car, which we had a right to disconnect at any point where we sought to disconnect it. This witness has just testified that the movements necessary to disconnect the defective car were exactly the same whether they took place here (indicating on diagram) or at any place here (indicating on diagram). The only difference is the car rolls three quarters [37] of a mile more. There are no more men going between the cars, there are no more men trying to couple and uncouple cars whether they roll three feet or three hundred yards or three quarters of a mile, and counsel will admit that the length of the movement involved in this case has no bearing whatsoever on whether or not a violation exists.

Now we performed the same movement that would have been done if it was possible or practical to do it on the interchange track.

We had no right to remove those cars for the purpose of repair, and therefore the question of the difficulty of repair or how minor these defects were from the standpoint both of hazard and of repair, is not pertinent.

Mr. Tolbert: I just want to say a word in reply to that. As to our position, I didn't apparently make myself exactly clear. These cars were on the interchange track. One was the S. P. inter-

(Testimony of R. J. Kingston.)

change track, and the other was the Western Pacific interchange track, and while there was no duty placed upon the defendant to make repairs to the cars—in fact, they could not haul them for the purpose of repair, but they had two alternatives: The cars had just been set over there on the joint track, and technically speaking you might say that the delivery was completed, but it wasn't actually completed until the Santa Fe hooked onto it and hauled it over there into their yard, and it seems to me that they had two alternatives. One was to go ahead [38] and repair these cars right where they stood or to have left the whole cut where the Southern Pacific left them and tell them to take them back. That was the purpose of asking that question.

The Court: Well, did they do either?

Mr. Tolbert: What is that?

The Court: Did they do either?

Mr. Tolbert: What they did was to haul the whole string of cars over here and keep them there several hours, and we don't know—I don't suppose anybody knows what was done with them over there, but they were switched around, whatever was necessary to be done——

Mr. Ewing: I think the stipulation of facts says they were simply cut out.

Mr. Tolbert: And one was hauled back to here (indicating on diagram) and the three were hauled back to the Western Pacific. The incidental hauling that was necessary to disconnect the bad-order

(Testimony of R. J. Kingston.)

cars from the good-order cars we don't raise any question as to law in that case. The 6th and 9th circuit have passed on that, and I think they have not only laid down good law, but they have laid down good common sense. But we don't think that that mere incidental hauling—that those conditions arose over here at the interchange point.

So, your Honor, the question I asked was whether, as I recall it, was whether those cars could have been readily repaired on the respective interchange tracks, and that was the [39] question, I believe, that counsel objected to.

Mr. Ewing: That is correct.

The Court: The objection is overruled.

Mr. Tolbert: Q. You may answer the question then. Perhaps after all of this you have kind of lost it. The question that I asked was—I believe you said that you knew about the defects, that is you knew of the type. The question I am asking you is whether the repair to the car that was on the Southern Pacific interchange track, which was a disconnected uncoupling lever, as I recall it, and the repair to the cars that were on the Western Pacific interchange track, could they have been repaired there?

Mr. Ewing: For the purpose of the record, may we save our objection to that, your Honor?

The Court: Yes.

Mr. Tolbert: Go ahead and answer the question.

A. To repair this car on the Southern Pacific?

(Testimony of R. J. Kingston.)

Q. I am speaking about the interchange track, you understand?

A. The interchange track, the defective car, it would require uncoupling all those cars, a switch engine to move them apart, and to get material and repair it. If that is the correct one I understand.

Q. Well, with respect to the first cause of action—we will just find what was wrong with that car. It says that that car there had a type E coupler—that is one of the newer couplers—[40] and that you had a single top cut rotating lever—that is, came over the top—and that the tozzle was not connected to the lock block. In other words, there was no connection between the uncoupling lever and the lock block, it had come apart.

Mr. Ewing: Counsel, may I have a stipulation that we object to all of the questions concerning the difficulty of repair?

Mr. Tolbert: Yes.

Mr. Ewing: So we won't have to interrupt further.

Mr. Tolbert: Yes.

The Witness: As I understand, the top—the coupling was disconnected within the body of the coupler.

Mr. Tolbert: Q. I don't believe the petition says that. It says the uncoupling lever was disconnected from the lock block, and referring to the original report—I was just going into it in detail—

(Testimony of R. J. Kingston.)

Mr. Ewing: We stipulated as to what the defect was. You might read the stipulation.

Mr. Tolbert: Yes, we will see what it says there.

From the stipulation, this was a Wabash car, equipped with a type E coupler, top operated. The top operated tozzle had the bottom U connection spread, which allowed it to separate from the lock block. And it also says to repair this condition it was necessary to remove the knuckle and the lock block and apply complete new uncoupling mechanism. [41]

A. That is correct.

Q. How much of a mechanism would that mean?

A. That is the operating mechanism within the body of the coupler. It requires an engine to disconnect the cars, take out the knuckle, take out the defective parts and put them back in.

Q. How long would you say that would take? As a practical railroad man.

A. It would depend on a number of things, the availability of the material you had, the time it would take to get a switch engine there to disconnect the cars—I couldn't state definitely what the time was because there is too many things involved.

Q. Suppose we pass on to the next cause of action. That related to Central of Georgia flatcar 11138. It says there that the coupling and uncoupling apparatus on the AN of said car was out of repair and inoperative, the uncoupling lever on the AN of the car being fouled by the lading.

(Testimony of R. J. Kingston.)

A. That was a load of lumber, and the coupling level would come up and hit that lumber, which prevented it from operating.

Q. How would you fix that?

A. The load would have to be shifted back to the end of the car by a switch engine or transferring the lading.

Q. The next car is ACL boxcar 18088. It says here that at said time and place said car was defective in that the coupling and uncoupling apparatus on the AN thereof was out of repair and inoperative, the lock block of coupler on said AN of said car [42] being inoperable, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers, coupling automatically by impact. That is all it says there—oh, here it is here—that the ACL boxcar number 18088 was a D top operated coupler with a number 2 lock lift which had worn until the anti-creep feature stuck in the knuckle lock, thereby making it inoperative. In other words, you had a jammed lock there?

A. Yes.

Q. What was necessary there?

A. In that particular case you would have to disconnect the cars and go through the same performance as on the last one, and either to replace it or they have a way of putting a little washer around the top of the lifter.

Q. I think that is all on that, because in the stipulation in regard to the fourth count it says

(Testimony of R. J. Kingston.)

here they had a bent hand hold there. That could be repaired by straightening the hand hold by the use of a bar.

Mr. Ewing: May I at this time, in case I didn't make it clear for the record, also, your Honor, we reserve the right in this stipulation to object to the immaterial portions of it, and to those portions of the stipulation which go to the question of the possibility of repair I would like to interpose the objection that that is wholly immaterial, irrelevant and incompetent in this proceeding. [43]

Mr. Tolbert: As I understand, Mr. Kingston, you are what is called the Joint Interchange Inspector?

A. Yes, sir.

The Court: Do you wish me to rule on that now?

Mr. Ewing: If you care to, your Honor, or you may reserve it.

The Court: Did you head the objection?

Mr. Tolbert: No.

Mr. Ewing: I made the objection with respect to the stipulation that anything that went to the question of the possibility of repair is incompetent, irrelevant and immaterial, the same objection I have made to your whole line of questioning concerning repairs on these cars.

Mr. Tolbert: Was that directed to this question?

Mr. Ewing: It was directed specifically to the last paragraph on Page 9, and to any other para-

(Testimony of R. J. Kingston.)

graphs where the question of the possibility of repair is raised.

Mr. Tolbert: If the Court please, counsel for the defendant drew this stipulation. He put that in there himself. Now he wants to object to it.

Mr. Ewing: No, I don't object to the fact, my objection goes to the materiality. I was trying to be fair in the stipulation of facts, so the issue would be before the Court.

Mr. Tolbert: I will just let it stand as it is. I am not questioning on that. [44]

Getting back to this other question, you are the Joint Interchange Inspector?

Mr. Ewing: I don't believe your Honor ruled on that.

The Court: The objection is overruled.

Mr. Tolbert: You do this inspecting not only for the Santa Fe, but for the Southern Pacific and Western Pacific as well?

A. Yes, sir.

Q. Do you make any repairs there yourself?

A. If they are practical, we do—that is, if they are possible.

Q. What type of repairs would be possible?

A. Well, supposing you had a brake shoe missing on a car, a running board bolt, minor repairs of that nature.

Q. Any defective uncoupling levers?

A. Yes, where it requires just a cut washer, cleavise or a link.

The Court: Where are the cars located?

(Testimony of R. J. Kingston.)

Mr. Ewing: Where are they now, you mean?

The Court: Yes.

Mr. Ewing: I guess that—this happened last April——

Mr. Tolbert: They are all over the United States.

Mr. Ewing: I might add here they were repaired by the companies that put them on the interchange tracks. I think that is true, counsel?

Mr. Tolbert: I think so. We have no knowledge of that. I don't know.

Mr. Ewing: We will assume that. [45]

Mr. Tolbert: Q. You say you make repairs to certain types of defective couplers, and I suppose the same would be true of bent hand holds, would it not?

A. In many cases, yes.

Mr. Tolbert: I believe that covers everything. I would like to make this statement to the Court, that this case,—I should have made it in the beginning—is based on the movement of these cars from these interchange tracks to the defendant's Mormon Yard. Now what happened after they got over there we don't know, but we did agree to the stipulation that the defective cars were hauled back and presumably were repaired. It is only on the movement we are bringing suit.

Mr. Ewing: Have you finished with your cross examination?

Mr. Tolbert: Yes.

(Testimony of R. J. Kingston.)

Redirect Examination

Mr. Ewing: Q. Mr. Kingston, of course any time that a crossing is either blocked or when cars are moving backward and forward, it presents some traffic hazard, does it not?

A. Yes, sir, it would.

Q. And the more frequent the occupation of any such crossing, the greater the hazard that exists, regardless of protection, is not that true?

A. Yes, sir.

Q. So that to the extent that these switching movements were made there and to the extent that they would increase the period of time that trains were moving over that crossing, the hazard [46] would be increased to that extent?

A. Yes sir.

Q. Now in these several cuts of cars were there other cars besides these defective cars?

A. Yes, there were.

Q. And in each instance there were a number of other non-defective cars? A. Yes, sir.

Q. Now when the Santa Fe went in and pulled that cut out, did they seek those non-defective cars?

A. That was their purpose for coming down there and pulling the cars.

Q. So when counsel asked you why they pulled the cut out, that was for the purpose of getting the non-defective cars, was it not?

A. Yes, sir.

Q. You were working right there on these inter-

(Testimony of R. J. Kingston.)

change tracks during the month of April, 1944, were you not? A. Yes, sir.

Q. Do you have a definite recollection as to whether those tracks, those interchange tracks were being used frequently during that month?

A. Yes, they were used continually. That is, cars either going in one direction or the other continuously.

Q. There was a heavy movement across both those interchange tracks? A. Yes, sir.

Q. Would it be correct to say that most of the time those interchange tracks had cars on them?

A. That is correct. [47]

Q. So, while you don't remember the number of cars at the particular moment this defective car was on it, you do have a definite recollection that these tracks were full practically without exception during the month of April, 1944?

A. Yes, sir.

Q. I suppose you even had cars backed up on the Southern Pacific, Santa Fe and Western Pacific trying to get across those interchange tracks, did you not? A. That is correct.

Q. Now I understood you, in answer to counsel's question about these repairs——

Mr. Ewing: You understand, your Honor, I go into this only because of your Honor's ruling, while reserving my position on the matter.

Q. You men there on the interchange tracks had the tools and equipment only to perform the most minor type of repair? That is true? A. Yes.

(Testimony of R. J. Kingston.)

Q. And with respect to these first three cars that counsel asked you about and the defects that existed, did you have the facilities or the tools to make those repairs?

A. No, sir, we didn't have the materials.

The Court: Q. Well, was there such material present where you worked and shops for repairs of that sort?

A. Not right out on those interchange tracks, no, sir.

Mr. Ewing: Q. I might ask you, if you know, where were those cars repaired? [48]

A. I don't know.

Q. Where would they normally be repaired?

A. Back on the delivering line repair track.

Q. Repair track?

A. Repair track. That is where they normally would be repaired.

Q. And that is the place where facilities are available for the repair of cars?

A. That is true.

Q. In making the class of repairs involved on these first three cars, would there be any greater hazard to the repair men to make those repairs on the interchange track than on a repair track?

A. Well, there would be considerable hazard on these interchange tracks. We are governed by protection of a blue flag and that is not always dependable, particularly where it is right in the Southern Pacific yards, and on the repair track you have the protection of a locked switch. You haven't the

(Testimony of R. J. Kingston.)

danger of switch engines running into your cut of cars. On the interchange tracks, particularly on these, there was five or six switch engines that were running around there all the time.

Q. In other words, those men who attempted to make a repair on the interchange track would have to be in between these cars where trains are operating on two lines of railroads on different sides of them and there is always an existing possibility that somebody would shove in a cut of cars on them? A. That is true. [49]

Q. That hazard would not exist on the repair track? A. No, sir.

Mr. Ewing: That is all.

Recross Examination

Mr. Tolbert: Q. In regard to this blue flag business, that is a practice on all railroads for the protection of car repairmen?

A. That is correct.

Q. As a matter of fact, the car repairmen do depend on that protection?

A. To a great extent, yes.

Q. Of course we know that there hasn't been a rule made that has not been violated many times, even on repair tracks? A. That is true.

Q. And if these cuts of cars were protected by the blue flags all the railroadmen working in the yard know what a blue flag means, don't they?

A. That is correct.

Q. That is, that there are men working there and not to go in there? A. That is correct.

(Testimony of R. J. Kingston.)

Q. I don't know whether I understood you on one answer here. You say the purpose of hauling the cut of cars over to Mormon was to get the non-defective cars, is that it, or the defective cars?

A. To get the non-defective cars.

Q. Now you spoke about not having the tools. What tools do you carry on this job?

A. Well, a car inspector carries mostly bad-order *cars*.

Q. He carries a hammer, doesn't he?

A. Yes. [50]

Q. Anything else?

A. Well, gauges; generally has a small wrench.

Q. Not any of the smaller materials for making repairs?

A. Outside of a cotter key, something like that.

Q. Any cleavise bolts?

A. A nut, something like that.

Q. One other question: You say when these cars are shoved in there that you inspect them and put these bad-order tags on them?

A. Yes, sir.

Q. What is the purpose of those bad-order tags?

A. ARL rules require that cars rejected in interchange for bad conditions be carded on both sides, and in compliance with ARL rules we put that card on there to notify trainmen and switchmen that they are in bad-order.

Q. Then do I understand that you are on the interchange track not for the purpose of making

(Testimony of R. J. Kingston.)

any repairs but simply to put these bad-order tags on, is that correct?

A. We are there to protect receiving lines—well, these bad-order cars—no, we put the bad-order cards on for whichever road that should make the repair, send them back to the road that they should be set back to—or put defect cards on them where they are side swiped or damaged, and make any like repairs like a cotter key or something we can make without any hazard.

Q. But you don't make any repairs that would involve uncoupling the cars?

A. No, because it is too uncertain as to time, take too long a time. [51]

Q. So when you put that bad-order card on there your job is done and whoever hauls it away is no concern of yours?

A. That is correct.

Mr. Tolbert: I believe that is all.

Mr. Ewing: That will be all. Thank you, and the defendant rests, your Honor.

Mr. Tolbert: Could I ask you just one more question before you leave?

Q. Do you recall from memory any violations of the blue flag by any of your own switching crews over there?

A. No specific case. I cannot recall.

Mr. Tolbert: That is all.

Mr. Ewing: We rest.

Mr. Tolbert: I would like to call Mr. Madison and have him sworn.

CLEVE H. MADISON,

Called for the Plaintiff, in rebuttal, Sworn.

Direct Examination

Mr. Tolbert: Q. What is your position, Mr. Madison?

A. Inspector, Interstate Commerce Commission.

Q. Inspector of what?

A. Safe appliances.

Q. How long have you been such an inspector?

A. Since March, 1921.

Q. Have you had any railroad experience previous to that? [52]

A. Twelve years locomotive engineer, three years fireman.

Q. Now I believe you were one of the inspectors that furnished the information upon which these suits were filed. I am speaking to you now, you were out there in the yard, you have the advantage over some of us, and when these cars were delivered by the Southern Pacific in what is known as the Southern Pacific interchange track, you were there, were you?

A. I will have to consult my record.

Q. The record was made at the time, was it?

A. Yes, sir. The record was made at the time. What is the number of that car?

Q. Where is my file? That is the first cause of action. That is Wabash boxcar 46354.

A. Yes, sir, I have a record of it—oh, pardon me, that is not it. Yes, sir.

Q. Now, Mr. Madison, based upon your experi-

(Testimony of Cleve H. Madison.)

ence as a railroad man, I think you said of some twelve years, and your experience as an inspector of safe appliances of some twenty-three or twenty-four years, I believe, you are, of course, familiar with railroad yards and equipment, are you not?

A. Yes, sir.

Q. Now when you made this inspection on this S. P. interchange and discovered the defective condition of this car, what would be your——

Mr. Ewing: One moment. I will have to object that that is a fact not in evidence. You assumed that he discovered this [53] defective condition.

Mr. Tolbert: All right. In making your inspection in the yards of defendant on April 4, 1944, did you inspect Wabash boxcar 46354? A. I did.

Q. What did you discover with respect to the uncoupling apparatus on the B end of the car?

A. I first inspected the car at 2:10 p.m., finding top of coupler on the B end, single top rotating lever and the tozzle nut connected to the lock block.

Q. Now as an inspector of safety appliances of something over twenty years, and as a railroad man of twelve years' experience, how much of a job would there be to make the proper repair to that coupler?

Mr. Ewing: May we object to that, inasmuch as this is new for this witness, we object that the amount of work which would be necessary to repair is wholly incompetent, irrelevant and immaterial as to any issue in this particular proceeding.

(Testimony of Cleve H. Madison.)

The Court: Are you acquainted with the situation and can you answer that question?

A. Yes, sir. I believe I can. I have seen it done so many times.

Q. That is what I want to find out.

Mr. Ewing: We don't complain about his qualifications, your Honor, just the relevancy.

Mr. Tolbert: Go ahead.

The Court: The objection is overruled. [54]

A. It was a very simple matter. The transfer engine must couple on the cut of cars to start with, and while they are coupled on it is a very simple matter to part the cars and make the repair. I am not positive that the material needed to repair this particular car was on hand at the interchange track on that day, but I have seen coupler repairs made on the interchange track, and this is a very simple matter. I would say thirty minutes would be ample time, and some inspectors could do it in five minutes.

Mr. Tolbert: Q. Well, while we are on that subject, we will go through with these other cars.

Mr. Ewing: I assume it may be stipulated that I may have this objection to the entire line?

Mr. Tolbert: Yes.

The Court: Yes.

Mr. Tolbert: Q. With respect to Central of Georgia flatcar 11138, did you inspect that in the yards of defendant on April 6th, 1944?

A. I did.

(Testimony of Cleve H. Madison.)

Q. What did you find there with respect to the coupler on the A.N. of the car?

A. I inspected it on the W. P. near Clay Street at 9:35 a.m. Had a type D coupler on the A.N., single top rotating lever, stay-right connection, load of lumber shifted to prevent center arm of uncoupling lever from operating the lock lift.

Q. Now from your experience previously alluded to, what would be necessary to make that repair?

A. The customary way upon some lines is for the switch engine to shove it against another car at speed—that is, uncoupled from the switch engine, and slip it back in the same way, have it slip forward just by the shock.

Q. Do you recall how many boards were hanging over this uncoupling lever?

A. The car was loaded with timber of various sizes, I think from 6 x 6 up to 10 x 10's.

Q. And I assume it was some of the bottom timbers that were fouling the coupling lever?

A. That is the only one that could, certainly.

Q. And is there another way that this repair could have been made?

A. Well, by transferring the load to another car.

Q. That other practice that you refer to of having the switch engine bump the car, have you seen that done?

A. Many times.

Q. Is it efficacious?

A. I will say so. Too much so sometimes.

Q. Now with respect to ACL boxcar 18088, that

(Testimony of Cleve H. Madison.)

is the third cause of action, did you inspect that in the yards of defendant on April 7, 1944?

A. I did.

Q. What did you find with respect to the coupler on the A.N. of that car?

A. I inspected it as it was being delivered by the Western Pacific to the Santa Fe on the interchange track. [56]

Q. What was——

A. After the train stopped on the interchange track, found that the block lock on the A.N. of car was inoperative.

Q. In what manner?

A. The lock block was stuck and could not be moved. It wasn't possible for us to make an inspection that would find out the reason for the block not being so it could be moved.

Q. What would be necessary in order to make the proper repair?

A. To uncouple the car, remove the knuckle, and then the best way—that is, maybe not the best way, the usual way nowadays is to put in a new block and new lift. It would depend upon the nature. It might be stuck for the reason of some defects in there.

Q. What other way could it be repaired?

A. No other way except uncoupling the car and taking out the lock block.

Q. I mean with respect to the lock block itself, you say the practical way would be to put in a new lock block, is that right?

A. That is right.

(Testimony of Cleve H. Madison.)

Q. Is there another way to repair it without putting in a new lock block?

A. Yes, they can be lifted out sometimes and they put on a washer or iron ring on the outside of the coupler to prevent it getting down to where it sticks.

Q. Does that have to be made of any particular material or design? [57]

A. No. Putting in a ring would be very simple, but it would be necessary to uncouple the car to get the lock block loose.

Q. Speaking from your experience—of course we realize no two lock blocks are alike—but from your experience as inspector would you say as to the length of time in making a repair of this type?

A. After the car was uncoupled, I would say ten minutes would be ample time.

Q. Now with respect to PRR boxcar 503205, that is the fourth cause of action, did you make an inspection of that in the yards of defendant on April 7, 1944? A. I did.

Q. And what did you find wrong with that, if anything?

A. The end sill handle on the B end, right side was bent against the end of the car. It was a metal end car—with no clearance.

Q. Did that destroy its efficiency as a hand hold?

A. It did.

Q. What would be necessary to make that repair?

Mr. Ewing: That is stipulated to.

(Testimony of Cleve H. Madison.)

The Witness: Well, it might be repaired by putting a bar between the hand hold and the end of the car and pulling it out.

Mr. Tolbert: Q. Would it be necessary to uncouple the car for that?

A. No, it wouldn't. But there isn't any guarantee that that repair would always work, the hand hold might break.

Q. Have you seen repairs made in that manner?

A. Many of them. [58]

Mr. Tolbert: That is all.

Cross Examination

Mr. Ewing: Q. Then I understand from you it might be necessary to go further than that, even further than we have agreed it would be necessary to repair that handle, is that right?

A. Oh, yes, that is entirely possible, yes.

Q. When you speak of having seen some of these various types of repairs, such as would have been necessary or advisable on these three first cars made on interchange tracks, would you say that that is the usual practice, to make that type of repair out on switch tracks?

A. Are you referring to these particular interchange inspectors?

Q. That is right.

A. Yes, I would say they are the most ambitious crew that I have saw. They go out of their way to repair cars.

(Testimony of Cleve H. Madison.)

Q. They have been particularly conscientious in that regard?

A. The best bunch of inspectors I ever saw.

Q. Then if they didn't repair these, and they are conscientious, hard working interchange inspectors, that would indicate that wasn't the type of repair which they could as a practical matter have made on these particular cars?

A. No, it wouldn't have indicated anything of that kind.

Q. You don't think so?

A. No, it indicated that they had more work than they had time to do. [59]

Q. Generally speaking, are these types of repairs made on interchange tracks or on repair tracks?

A. Well, I think they are all—with the exception of the shifted load—all considered yard repairs.

Q. The shifted load you agree is not a yard repair?

A. Well, it is strictly a yard repair, but I made a difference between them because it would have been necessary to move this car with the shifted load at speed and let it bang into another car.

Q. You said that was one way that could have been done, but I think you indicated that would not be the best way to remedy the defect?

A. Of course the yardmaster's rule has something to do with that. If he can shift a load by bumping it with a switch engine, he is not going to hold the load up by sending it to the repair track.

(Testimony of Cleve H. Madison.)

Q. That wouldn't be the safest way to handle it, would it?

A. Bumping it into another car?

Q. Yes.

A. I can't say I have ever heard of anyone getting hurt that way.

Q. What is your opinion as an operating railroad man, would you say that would be the safest practice to shift that load or to have it done by having men move it timber by timber?

A. I have never heard of anyone getting hurt—

Q. You are not answering my question. Do you consider it the safest practice?

A. Well, I don't consider that what [60] I consider the best way would have any effect on how to shift these loads.

Q. I just want your opinion now. You have had a lot of experience.

A. Some would. That would be the proper way to shift some loads.

Q. Some loads?

A. And others—if it was finished lumber, fine lumber, they don't do that, because they don't shift easily.

Q. Do you grant, Mr. Madison, that the repairing of cars necessitating the going between cars would be more hazardous for repairmen even with blue flag protection where such repairs were performed upon an active, busy interchange track than it would be if—than they would be if they were

(Testimony of Cleve H. Madison.)

performed on repair tracks known by operating men to be repair tracks?

A. Interchange tracks are not busy and active when they are protected by blue flags on either end.

Q. You are assuming something that I didn't have in my question, Mr. Madison. How long did you observe these interchange tracks down there?

A. You mean up to now?

Q. Yes. A. I would say about sixty days.

Q. Has there been heavy traffic over those interchange tracks?

A. Oh, yes. Sometimes in cuts up to as high as forty.

Q. Do train crews ordinarily expect to find blue flags out on these interchange tracks?

A. They certainly do, and they certainly obey them. [61]

Q. Assuming that they obey them, don't you recognize that there is a human element in railroad operations affecting safety? You do recognize that, do you not?

A. Certainly, of course, but there isn't any rule in the book that is obeyed so religiously as the blue flag rule, because that means there are men working under cars.

Q. Well, you have known of instances of the blue flag being violated, have you not?

A. I can't say that I have.

A. A repair track is known by all the employees to be a place where repairs are habitually conducted, isn't that true? A. Pardon?

(Testimony of Cleve H. Madison.)

Q. I say, a repair track is known to the employees to be a place where repairs are ordinarily and customarily being performed?

A. Oh, yes, that is true, but no repair track is involved in this case.

Q. That is all right, but that is true, is it not?

A. Oh, yes, certainly.

Q. So that trainmen going in on tracks known to be repair tracks have that thought in mind when they go into those tracks?

A. Well, repair tracks as a rule are locked with switches that the switchman can't open.

Q. So in addition to the fact that switching crews know that they are repair tracks, there are also locks to keep the switches from being opened and the men going in and moving cars [62] with repairmen working under them, which is not true of interchange tracks?

A. No; they just have the blue flag.

Q. So you will admit that insofar as locked switches are concerned, the hazard to the repairmen, if they make these repairs on the interchange tracks would be greater than if they were performed on the repair tracks?

A. No, I can't agree that there is much difference in the danger.

Mr. Ewing: I believe that is all, your Honor.

Mr. Tolbert: That is all. I would like to call Mr. Hynds and have him sworn.

Mr. Ewing: Counsel, will he testify any differently?

Mr. Tolbert: No, he will testify the same as Mr. Madison, but I did want to bring out some of the necessary movements to set the car out. If you will agree that he will testify in just the same way Mr. Madison did, it will save some time.

Mr. Ewing: I will stipulate he will testify the same as Mr. Madison on his whole testimony, and then you may add anything you want.

Mr. Tolbert: I want to ask him something that I really should have asked Mr. Madison.

A. A. HYNDS,

called by the Plaintiff, in rebuttal; sworn.

Direct Examination

Mr. Tolbert: Q. Mr. Hynds, what is your position with [63] the Interstate Commerce Commission?

A. Inspector of safety appliances.

Q. How long have you been such an inspector?

A. Twenty-two years.

Q. Have you had any railroad experience prior to that?

A. Yes; ten or twelve years as brakeman and conductor.

Q. And during your experience as a brakeman or conductor you have done a considerable amount of switching, have you not? A. Yes, sir.

Q. Now you were with Mr. Madison on these days when these cars were inspected on the Southern

(Testimony of A. A. Hynds.)

Pacific interchange and the Western Pacific interchange. From your experience as a safe appliance inspector in a good many yards and your experience as a brakeman and a conductor having done a considerable amount of switching, and having been in this particular yard and knowing the track layout, what would you have to say with reference to setting these four defective cars out, from the Southern Pacific interchange and three from the Western Pacific interchange, without taking them over to Mormon Yards?

A. From this point of the Southern Pacific interchange to Mormon Yards (indicating on diagram), the movements are made over the main track of the Santa Fe, over which this passenger trunk moves. When switch engines or transfer engines are occupying that track, they do that under the protection of orders or information supplied by their yardman or under Rule 93, the yard [64] limit rule, which protects them against second or inferior class trains. The first class trains' protection they have to have orders on or know that the first class trains are not in operation or have passed. So therefore they are assumed to have full authority to operate on the main line in either direction, otherwise protect themselves by flag, Rule 99. In making this movement from the interchange track (indicating on diagram)—

Q. You are speaking about the Southern Pacific interchange track?

A. That is out from the Southern Pacific inter-

(Testimony of A. A. Hynds.)

change track to the Mormon Yard they have access right on that piece of track. There is no interference with traffic, as far as that is concerned. This car of the first cause of action was some four or five cars in from the east end of the interchange.

Q. That would be the end nearest the switch?

A. That would be the end nearest the switch. All they had to do was pull their cut out—if it were necessary to get the towerman to move these switches, as testified—I don't know whether that was the case at that time or not—but all switches may be used for any trains having authority and necessity even though they are controlled by a towerman. They can get the information to the towerman and give the signal of what track they want and he can line up the switches through his tower mechanism. Pull these cars up to the main line, throw the bad-order cars into the interchange track, take up the first cut and [65] go on home. That is on the S. P.

Q. How about on the Western Pacific interchange?

A. On the Western Pacific interchange, on the fourth cause of action, the Pennsylvania car 503205, that car stood first out at the east end.

Q. Nearest the switch?

A. Nearest the switch. They shove their cut from the Mormon Yard up to the lead track number 1 into the delivery track of the W. P. They went back to the switch, coupled onto Pennsylvania car 503205 and the rest of the cars which were to the

(Testimony of A. A. Hynds.)

west or south as they go around the curve, and pulled the entire cut to the Mormon Yard. All they had to do at that time to make the switch was to cut off the PRR car and throw it over on the delivery track on top of the cut that they shoved in, and there was room to do that, then they could make that movement to the Mormon Yard with the rest of the cut.

Q. With the good order cars?

A. That is it.

Mr. Tolbert: I believe that is all. You may ask him.

Cross Examination

Mr. Ewing: Q. You say you don't know whether or not that inter-crossing tower—what do you call that? A. Interlocking tower.

Q. —interlocking tower was there on this date or not? A. I didn't say that.

Q. What was it you said you didn't know? [66]

A. I knew the tower was there. I said I didn't know whether it was the practice then or is now for them to get the switch from the interlocking tower.

Q. I see. You heard Mr. Kingston's testimony that it was? You don't quarrel with his testimony about that?

A. No, I don't quarrel with his testimony about that, the only thing I take exception to—or mention is that he said it was impossible to switch between these two points because of the interlocking tower.

(Testimony of A. A. Hynds.)

Q. Let me ask you this: In order to make this movement, to shove this cut of cars clear up beyond the crossing tracks, the Western Pacific and the Southern Pacific, wouldn't it be necessary to get clearance from both railroads in order to make that switching movement?

A. I wouldn't say it would be necessary to shove them clear up beyond the crossing.

Q. You heard his testimony on that?

A. On that one item?

Q. Yes.

A. I would say—do you have a ruler available?

The Clerk: Here is a ruler.

(The witness measures on diagram.)

A. I would say no, it would not be necessary to shove across the Southern Pacific. That is somewhere in the neighborhood of four inches—four hundred feet. But it would be necessary to pull back across the W. P. main line, because he does that anyway. [67]

Q. He has to do that twice on a switching movement? A. Yes, he would.

Q. If he switched out one car, he would have to block out the Western Pacific main line twice?

A. That is true.

Q. Of course, his testimony was he would have to block the Southern Pacific main line too?

A. He would, if he had too many cars, but—

Q. Do you think that is a more practical way to make the switch than to simply move it to the Mormon Yards? A. It is safer, yes.

Q. You would first have to disconnect your non-defective car? A. No, sir. [68]

Q. You want to pull the whole cut out?

A. Yes.

Q. You want to pull the whole cut out and shove the whole cut back up the main line?

A. That is right.

Q. All right. How many cars were in there on that day? A. I don't know.

Q. You know how many cars back it was from this cut?

A. It was some five or six cars back.

Q. Give us your best estimate how many cars were in the cut. A. I don't know.

Q. Do you know how many cars that interchange track holds? A. No, sir.

(Testimony of A. A. Hynds.)

Q. It is safer to block those crossings twice than it is to pull it back to the Mormon Yards?

A. It is safer for the employees of the railroad.

Q. Don't employees get injured when you have blocks on crossings?

A. These crossings are protected by wig-wag signals.

Q. Tell me how it is safer to the employees of this railroad to pull that cut out and shove it clear back here across these main line tracks and come back in on the interchange track and hook onto the rest of the non-defective cars—— A. No.

Q. That is what you have to do in order to do what you are talking about.

A. No, you have the switch backwards.

(Testimony of A. A. Hynds.)

Q. Can you give us an estimate?

A. No, sir.

Q. Would you say it holds as many as forty cars?

A. In this link in here (indicating on diagram)?

Q. No, on that whole interchange.

A. I would say probably two hundred.

Q. But you have no recollection of how many cars were in that cut that day? A. No, sir.

Q. Well, if it held two hundred cars, and they pulled that whole cut of cars out on the main line and shoved it back here it would block not only the Southern Pacific but the Western Pacific main lines, would it not?

A. I said this whole link (indicating on diagram) might hold two hundred cars. That goes clear back to the Southern Pacific Depot. [69]

Q. At any rate, there were quite a few cars on that interchange that day?

A. There was some cars.

Q. You don't know how many? A. No.

Q. But you know this was five cars back. Now, in order to make the movement you speak of, you pull the whole cut onto the main line and shove the whole cut up the main line, and if it was three hundred or four hundred feet in length it would block both the Southern Pacific and Western Pacific, and then disconnect the defective car with the small cut, pull them back down the main line, throw the switch, shove the small cut with the defective car into the interchange, disconnect the defective

(Testimony of A. A. Hynds.)

car, come back on the main line with your small cut, shove back up the main line, hook onto the remainder of your cut and go back to the Mormon yard, is that right? A. That is true.

Q. Tell me how it would involve any more hazard to perform this movement that I will now give you than the one you have just testified about, namely, to have gone in there as was done in this instance and pull the entire cut down to the Mormon Yards, there disconnect and shove back into that interchange track the defective car?

A. When you take the cars down here at the Mormon Yard you take them in this yard (indicating), and in order for a man—we will say the cars are pulled in here (indicating) and set out on number 5 as they usually are. The cars are left there. They are not switched by the crew that is [70] cognizant of this defect.

Q. They have cars on them, don't they?

A. They do, yes.

Q. This did? A. Yes.

Q. Go ahead.

A. When anybody goes into that number 5 track to switch those cars, they get in there and they can't get the pin on this car.

Q. Go ahead.

A. And therefore it is necessary that they go under and around between here on the other car to get the pin.

Q. My question is is it necessary for these men to make any more movements or more hazardous

(Testimony of A. A. Hynds.)

movements to disconnect these cars in the Mormon Yards or to make the movements you testified should be made?

A. They make the same number of movements, but the men that are aware of the defects are working solely in connection with this movement, whereas in the other movement the second crew who returns the car is not.

Q. Aren't the men always aware of defects when they are inspected? A. No, sir.

Q. You are assuming that some other crew made this change. You don't know that, do you?

A. I know it from this——

Q. But do you know that from your own knowledge?

A. No. I assume it from the lapse of time.

Q. Mr. Hynds, are you quite sure that car was the 5th car back [71] in that cut?

A. I said 5th or 6th.

Q. Or could have been the 20th car?

A. It could have been.

Q. I have here, Mr. Hynds, a record of the line-up of those cars, which indicates that that car was the 20th car back in that cut.

A. It could have been. I said some five or six, my recollection——

Q. There was about 20—about 30 cars in that cut? A. Which would make it easier my way.

Q. Is that right? A. Yes, sure.

Mr. Tolbert: May I interrupt you? The car he

(Testimony of A. A. Hynds.)

is talking about coming beyond the Southern Pacific interchange is the Wabash car.

The Witness: That is the only one that came up beyond the Southern Pacific.

Mr. Ewing: There she is (indicating document). It is the 20th car in that cut.

Mr. Tolbert: Yes.

Mr. Ewing: That is all.

Redirect Examination

Mr. Tolbert: Q. Now, Mr. Hynds, I just want to ask you a question or two. Counsel has laid much stress on the fact that if you hauled this cut of cars out in order to set the bad-order car back in you would block these railroads. As a matter of fact, every time you cross a railroad you block it?

A. Of course. This particular crossing—on both the W. P. and [72] the S. P. when the Santa Fe goes across there the interlocking plant takes care of operations on the passing railroads.

Q. Then it would be the same on a switching movement, would it not?

A. Absolutely, yes. They put the signal up to block. They have to block the Southern Pacific north and south and they have to block the Western Pacific north and south of the Santa Fe main line, and they are blocked by signals and derails that are operated solely from the towers to facilitate the movements east and west.

Q. Now I don't think we asked you about this track leading up from the interchange track which is called "285 Joint Track, A. T. & S. P.", would

(Testimony of A. A. Hynds.)

there be any reason why those cars could not be shoved up there a sufficient distance to cut this car out? A. Not that I know of.

Mr. Tolbert: That is all.

Recross Examination

Mr. Ewing: Q. Could that have been full of other cars? A. It may have been.

Q. Was it? A. I haven't any record of it.

Mr. Ewing: That is all.

Mr. Tolbert: That is all we have in rebuttal, your Honor.

Mr. Ewing: We rest.

The Court: The Court will have you gentlemen submit the matter on briefs. [73]

(Discussion as to briefs.)

(The matter was ordered submitted on briefs thirty-thirty and ten.)

[Endorsed]: Filed Dec. 15, 1945. [74]

[Endorsed]: No. 11237. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Atchison, Topeka & Santa Fe Railway Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed January 22, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11237

UNITED STATES OF AMERICA,

Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY,

Appellee.

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY

The Appellant designates for inclusion in the printed record on appeal the entire transcript from the District Court as certified and filed with this Court on January 22, 1946, and proposes on its appeal to rely upon the following points:

1. The District Court erred in holding that as to each of the cars involved in this action the "defendant * * * refused to accept said car in its defective condition." (Findings of Fact IV in each cause of action.)

2. The District Court erred in holding that the movement by the defendant of each of the defective cars was "incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it" to the delivering carrier. (Findings of Fact VIII in each cause of action.)

3. The District Court erred in holding that the movement by the defendant of each of the defective cars "included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it" to the delivering carrier. (Findings of Fact VIII on each cause of action.)

4. The court erred in holding that the movement of each of the defective cars by the defendant "was the most practical method of disconnecting said car from the nondefective cars and returning it" to the delivering carrier "which could have been adopted under operating conditions prevailing at said place on said date." (Findings of Fact IX on each cause of action.)

5. The court erred in holding "that the method adopted by defendant in disconnecting" each of the defective cars "from the nondefective cars with which it was delivered and returning it" to the delivering carrier "subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them." (Findings of Fact XII on each cause of action.)

6. The court erred in holding as to each of the defective cars "that any other method of disconnecting of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said inter-

change track.” (Findings of Fact XII on each cause of action.)

7. The court erred in holding that the movement by the defendant of each of the cars involved in this action “after its refusal in interchange for the purpose of and incidental to disconnecting it from non-defective cars and returning it to the delivering carrier, as found by the court to be a fact, does not constitute a violation of the provisions of the United States Code, Title 45, Sections 1 to 16, inclusive.” (Conclusions of Law I on each cause of action.)

8. The court erred in holding “that the method used by the defendant in disconnecting” each of the cars involved in this action, “from the other cars and returning it to the delivering carrier, as * * * found by the court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.” (Conclusions of Law II on each cause of action.)

9. The court erred in holding that “the defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16 inclusive” as to any of the cars involved in this action. (Conclusions of Law V on each cause of action.)

10. The court erred in holding that on each “cause of action defendant is entitled to judgment against plaintiff.” (Conclusions of Law VI on each cause of action.)

11. The court erred in holding in effect that a carrier knowing cars to be defective before they come into its possession and while asserting refusals to accept them from delivering carriers, may move them approximately a mile and a half over its own lines and justify doing so on the ground that the hauling was only such as was necessary to disconnect them from other cars and redeliver them to the delivering carriers. (Findings of Fact III, IV, VI and VII and Conclusions of Law I, II, V and VI on each cause of action.)

UNITED STATES OF AMERICA

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[Endorsed]: Filed February 7, 1946. Paul P.
O'Brien, Clerk.

No. 11237

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

In the District Court of the United States, for
the Northern District of California, Northern
Division.

No. 4906—Civil

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Defendant.

OPINION

Plaintiff charges defendant, which will hereinafter be referred to as the Santa Fe, with violations of the Acts of Congress known as the Safety Appliance Acts (45 U.S.C.A., sec. 1-16). All violations are alleged to have taken place between April 4th and April 7th, 1944, in Stockton, California.

The first count sets forth that an uncoupling lever was disconnected from the lock block of a coupler; the second, that the uncoupling lever was fouled by lading; the third, that the lock block of the coupler became inoperable, and the fourth, that the handhold on the right hand side of a car was bent in against said car.

An agreed statement of facts was filed wherein each of the defects was admitted by defendant. Said agreed statement set forth that the Wabash box car involved in the first count was placed on an interchange track between the Southern Pacific Railroad

and the Santa Fe; that when so placed on said interchange track by the Southern Pacific, said car was coupled between other cars which were not defective, in such fashion that the other non-defective cars could not be moved or used without the movement of said Wabash box car; that the Santa Fe inspected said cars, discovered the defective condition of said Wabash car and refused to accept the same in that condition; that said car was disconnected upon its removal to the Santa Fe yards with the other cars, and was redelivered to the Southern Pacific by placing the same on the interchange track; that to repair the defective condition it was necessary to remove the knuckle and lock block and apply complete new uncoupling mechanism.

Similar stipulations were made with reference to a Georgia flat car placed on the interchange track between the Western Pacific Railway System and the Santa Fe, which was in a defective condition because the load thereon had shifted so as to prevent the operation of the uncoupling lever, in order to repair which it was necessary to shift the entire load to clear the uncoupling lever; an A.C.L. box car placed on the interchange track by the Western Pacific on which the lock lift had worn until the antiereep stuck in the knuckle lock, in order to repair which it was necessary to remove the knuckle, free it, put back the lock lifter and apply a link at the top of the lock lifter to prevent it from dropping down and falling in the knuckle lock; and a P.R.R. box car placed on the interchange track by the West-

ern Pacific, in order to repair which it was necessary to straighten out the handhold by the use of a bar.

A map referred to in said agreed statement of facts was introduced at the trial as a joint exhibit. It shows the part of the City of Stockton where the main lines of the three Railroads, interchange tracks and the Mormon Yard of the Santa Fe are located; and that the distance from the Southern Pacific and Santa Fe interchange track to the Santa Fe yard was approximately eight-tenths of a mile, and from the Western Pacific interchange to the Santa Fe yard was approximately seven-tenths of a mile.

The defendant set forth in its answer that in order to disconnect each of the disabled cars from the remaining cars in said string or train which were not defective, it was necessary to move said string or train of cars from the interchange track to the switch yards of defendant, there to disconnect the same and re-deliver it to the interchange track, and that the handling of the car described was purely incidental to disconnecting it from the remaining cars in the string or train in which it was connected or delivered by the interchange company.

Defendant's counsel argued that the only handling which took place was that which as a practical proposition was incidental to disconnecting the cars in question from the other cars on the track so that the Santa Fe could use the cars which were not defective and not thereby block the interchange track for an indefinite period of time while it might have called on the other railroad companies to go in there and switch out these cars.

R. J. Kingston, chief Joint Inspector at Stockton, was called as an expert witness by defendant. He explained that in order to switch out certain defective cars it was necessary to move them from the interchange track with the Southern Pacific near square 278 on the map to Mormon Yard No. 1 track, as there was no switch until they arrived at said yard.

Questioned about the possibility of switching the cars at a certain point outside the Mormon Yard, he said it was on the main line of the Santa Fe, that the switch there is governed by a tower and cannot be thrown. He further testified that the defective cars could not have been dropped at another point because there is only a single track there, and that it would have been a hazard to traffic to pull the cars anywhere other than to the Mormon Yard.

He expressed the opinion that it would have been dangerous to repairmen if an attempt had been made to make the repairs on the interchange tracks because there were five or six switch engines "running around there all the time;" whereas on the repair tracks there was the protection of a locked switch. He further testified that the movement of traffic over the main Santa Fe line in this vicinity was heavy during the month of April, and if it were possible to have used the switches which come onto this main line, it would have delayed traffic of the Santa Fe and the Western Pacific to have switched the cars on that track.

The witnesses Cleve H. Madison and A. A. Hynds, Inspectors for the Interstate Commerce Commis-

sion, expressed opinions somewhat contrary to those of the witness Kingston, but they were not as familiar with the local situation as he. His familiarity was gained from experience on the Stockton interchange transfer over a period of fifteen years.

In a situation comparable to this, involving matters of judgment, it was said: "Upon such a question, involving as it does many elements, the decision of those in charge of the business, if made in good faith, is entitled to serious consideration." *United States v. Boston & M. R. R.* (D.C.) 243 Fed. 795, 796. The decision of the Santa Fe to segregate, as it did, the cars on which the "bad order" tags were placed, appears to have been made in good faith and is entitled to considerable weight as explaining why the penal provisions of the Safety Appliance Acts should not be applied.

United States v. Western Railroad, 297 Fed. 482, 484, mentions that the "penalty is laid only on a use of the car." It is conceived that such use must be substantial and primarily connected with actual transportation of persons or property for hire in order for the penal provisions of the statutes to become applicable.

The movement of the cars designated in plaintiff's complaint was purely incidental to returning them to the interchange carriers which had attempted to deliver them to defendant. No use of them for any profitable or productive purpose was made by defendant.

Defendant did not attempt to repair the cars itself, but proceeded to return them to the other carriers

as expeditiously as possible. No acceptance of delivery thereof by defendant was evidenced. Instead, defendant proved its rejection of the proffered delivery. The Inspector placed "bad order" tags on all of them. Defendant's employees separated them from the non-defective cars and proceeded to return them to the other carriers to be repaired.

The moving of cars by defendant was simply one step in the process of returning them. Defendant used every effort to avoid use of said cars so that its return of them would be prompt and effective.

In *Southern Ry. Co. v. Snyder*, 187 Fed. 492, 497, the Court emphasized the necessity for withdrawing defective cars from commercial use. Defendant's actions herein indicated that it complied with the spirit of the statutes in not accepting these cars or employing them commercially, but in proceeding to return them to the interchange carriers.

The present case is regarded as one wherein the principle of reasonableness of interpretation and application of statutory law should be applied. The latter of the statute calls for the exaction of a penalty if any movement whatsoever of cars, defective in the particulars specified in the statute, occurs. The spirit of the law calls for the exaction of the penalty only if the movement is of such substantiality, and under such circumstances, as to defeat the purposes of the enactment. One of the principal purposes was the protection of employees.

Such protection could be afforded in the instances herein involved by the repair of the defective cars. Repairs could properly be made only by moving the

cars to points where the interchange carriers responsible for making the same could be reasonably expected to have the facilities for proceeding therewith.

In order to make the returns to these carriers, a certain amount of switching was necessary. Differences of opinion were expressed by witnesses for plaintiff and defendant, but those given for what defendant did were not unreasonable. Among them were these—that switching cars on the main line tracks would have resulted in considerable delay or congestion of traffic; that attempting to make repairs on the interchange tracks would have been dangerous because no blocking was there possible, but reliance could have been had only on “blue flags” as signs of warning; and that the method used by defendant afforded the added protection of the use of blocks.

The Supreme Court said in *United States v. Farenholt*, 206 U.S. 226, 51 L. Ed. 1036, 1037: “A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And ‘construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text,—conclusions which are in the spirit, though not within the letter, of the text.’ ”

In *United States vs. Illinois Central R. R.*, 170 Fed. 542, the Court stated: “It seems clear to us that Congress, having accomplished its purpose by requiring carriers to equip their cars in the manner

prescribed and to continue such equipment, was content to leave the incidents of the use to be regulated by the rules and principles of the common law.

“Generally, the accepted rule is that if a given construction of a law leads to such results that it seems harsh, unreasonable, or to be performed with a great excess of difficulty, the court, on seeing such a prospect, will turn back to see if a construction is possible whereby such consequences can be avoided and another construction imposed having a more reasonable result. Such an act, we think, ought not to be so construed as to imply the intention to impose these consequences, unless its provisions are such as to render the construction inevitable. A time-honored rule for the interpretation of statutes forbids it. Said Mr. Justice Field, in delivering the opinion of the Supreme Court in *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278:

‘All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislation intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.’ ”

In *United States v. Illinois Central*, 156 Fed. 182, it was said: “The authorities we have cited seem clearly to show that, if a strict and literal construction would lead to manifest injustice and oppression, then the language used should be so construed as to

avoid those results. The defendant is a common carrier, engaged in the performance of important duties to the public, involving great and various obligations, to which it is strictly held. * * * We cannot resist the conviction that the most urgent insistence upon a literal construction of the statute would balk in a case where a train running at speed between stations in some way broke some part of the safety appliance equipment. The literal interpretation contended for by the counsel for the United States demands, and counsel insists upon, the conclusion that, if the train proceeds at all for any distance (even the shortest) after the break occurs, the offense is complete, and that it is not for the courts to say that an offense has not been committed, but that it is for the executive officers to decide whether the government will overlook the offense or prosecute it. The courts, however, if appealed to, could hardly yield to a view which would exclude them from the function and the duty of passing upon the proper meaning of the act, and determining for themselves whether a person accused was guilty of a public offense; and in the exercise of that duty they can scarcely fail to say that common sense demands some relaxation from a literal construction in the case supposed."

This Court agrees with the views above indicated, and holds that common sense demands here sufficient relaxation from a literal construction to permit the defendant Santa Fe to switch the cars herein involved without incurring a penalty.

That leeway should be allowed to railroads with

respect to repairs was evidently apparent to Congress when it enacted Section 13 of the Safety Appliance Acts and thereby allowed the hauling of equipment "discovered to be defective or insecure to the nearest available point where such car can be repaired." Necessarily, the determination of what is the "nearest available point" and what is a reasonable movement of equipment involves judicial discretion. Similar determinations of what is reasonable must be made in applying other sections of the Act. When a movement of cars is purely incidental to the return thereof to one interstate carrier by another, the reasonableness of such movement is a matter for determination by the Court.

That the switching done by defendant herein was reasonable, and that no penalty should be exacted therefor is indicated by the following authorities:

In *United States v. Northern Pacific Ry. Co.*, 287 Fed. 780, 784, the Court said: "It is the duty of the interstate carrier to inspect the cars before receiving them into and hauling them in its trains, and, if found defective, to refuse to haul them."

In *United States vs. Louisville R. R.*, 1 Fed. (2d) 646, the Illinois Central pushed in upon the Terminal Company's interchange track a cut of some 20 cars; upon inspection, one was found defective, and was marked with a placard showing that it was in bad order and to be returned. The Court analyzed four physically possible courses of action, and commented: "There was no way of completing the rejection by a return except in the manner adopted.

* * * Statutory niceties aside, there is no appealing

reason why one railroad should be penalized for a car movement that would have been lawful if by another road. * * * We are not persuaded that the course which was taken is subject to condemnation. * * * Upon the whole case, we conclude that the Louisville Company correctly interpreted its statutory duty."

In *Baltimore & O.S.W.R. Co. v. United States*, 242 Fed. 420, the Court announced: "In case a defective car is received from a connecting carrier in a string or train of cars, the more incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the Act; such incidental handling of the car not being in contravention of the purposes of the Act, but a necessary step in furtherance thereof."

This Court takes judicial notice that the alleged violations took place in time of war when the burden of traffic on the lines of defendant, and the other railroads herein mentioned, was unusually heavy.

It is therefore believed that defendant should not be held to as strict accountability in relation to the provisions of the Acts under which this suit is prosecuted as under ordinary conditions when more facilities would be available and more time could be taken for determining methods of procedure and execution of the details of operation.

Testimony offered at the trial, and the agreed statement of facts, indicate that defendant was in urgent need of the non-defective cars to which the defective ones were connected. While witnesses for plaintiff expressed the belief that other means of detaching the defective cars might have been used, the evidence as a whole sustains defendant's actions as reasonable and practicable under the circumstances.

It Is Therefore Ordered that defendant be given judgment, without costs, upon findings of fact and conclusions of law to be prepared and submitted by the attorneys for defendant.

Dated: July 6, 1945.

MARTIN I. WELSH,

United States District Judge.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

C. W. CALBREATH,

Clerk, District Court of the U. S.
Northern District of Calif.

By /s/ JACK CLARK,
Deputy Clerk.

[Endorsed]: Filed July 7, 1945.

[Endorsed]: No. 11237. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Atchison, Topeka & Santa Fe Railway Company, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed April 12, 1946.

/s/ PAUL P. O'BRIEN,
Clerk.

No. 11237

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**THE ATCHISON, TOPEKA & SANTE FE RAILWAY
COMPANY, APPELLEE**

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION**

BRIEF FOR APPELLANT

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FILED

APR 5 1946

PAUL P. O'BRIEN,
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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11237

UNITED STATES OF AMERICA, APPELLANT

v.

THE ATCHISON, TOPEKA & SANTE FE RAILWAY
COMPANY, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION*

BRIEF FOR APPELLANT

STATEMENT OF BASIS OF JURISDICTION

This is an appeal from a judgment [R. 34] rendered against the appellant, United States of America by the District Court of the United States for the Northern District of California, Northern Division, upon a finding [R. 12 et seq.] for the appellee in a civil action under the Safety Appliance Acts, Title 45 U. S. C. §§ 1 to 16, the Complaint [R. 2] having been filed on May 2, 1944.

The District Court had jurisdiction under 45 U. S. C. § 6 and this court has jurisdiction under 28 U. S. C. §§ 211 and 225 (a).

Following the judgment, the appellant duly filed its Notice of Appeal from said judgment against it within the time prescribed by law [R. 35].

Thereafter, the appellant duly filed a Designation of Portions of Record To Be Contained in Record on Appeal, within the time prescribed by law [R. 35].

Thereafter a Reporter's Transcript containing all of the evidence in the case [R. 39-110], was prepared and the Transcript of Record in this case including said Reporter's Transcript was filed with the Clerk of this Honorable Court, and a Designation of Record on Appeal and Statement of Points on which Appellant Intends to Rely [R. 111] was duly filed with the Clerk of this Honorable Court.

STATEMENT OF THE CASE

This is a civil action under the Safety Appliance Acts, Title 45 U. S. C., §§ 1-16. There are four causes of action, and a judgment for \$400 and costs is prayed for. The case was tried without a jury. Some of the facts were agreed to by written stipulation [R. 41-47]. Oral testimony was introduced by both parties [R. 51-110].

The first three causes of action relate to the hauling or using of three freight cars upon which one of the automatic couplers on each car was inoperative, thus making it necessary for men to go between the ends of the cars in order to operate the couplers on those cars. The fourth cause of action is based on the hauling or using of a freight car upon which one of the side handholds was bent in against the side of the car, thus rendering that appliance insecure and ineffective. Handholds of this nature are required by statute to be placed on freight cars "for greater security to men coupling and uncoupling cars." 45 U. S. C., § 4.

None of the cars involved in this action became defective on appellee's line of railroad, but they were delivered to the appellee at Stockton, California, on April 4, 6, and 7, 1944, hauled by appellee to its Mormon yard, approximately one mile distant, and later returned by appellee to the interchange tracks of delivering carriers.

Appellee claims that it had not accepted the defective cars, but that in hauling them to and from its Mormon yard, it was engaged only in the incidental handling necessary to disconnect them from other, nondefective cars, and return them to the delivering carriers.

A blueprint map was filed with the court below showing the lay-out of tracks where the cars were received, the point to which they were hauled by the appellee, switched out, and later returned, as well as the connecting and adjacent tracks [R. 53].

The car named in the first cause of action was hauled by the Southern Pacific Company to the Southern Pacific-Atchison, Topeka & Santa Fe Railway (commonly and hereafter referred to as the Santa Fe) interchange tracks, which are shown on the map as extending diagonally across square 284 of the map, and left there for delivery to appellee.

The cars referred to in the second, third, and fourth causes of action were hauled by the Western Pacific Railway to the Western Pacific-Santa Fe interchange tracks, which are shown on the map as extending diagonally through square 291 of the map, and left there for delivery to appellee.

Upon arrival of these cars, together with other cars, on the interchange tracks, they were inspected by a joint interchange inspector in the employ of the three above-mentioned railroads, including the appellee, at which time the defects complained of were discovered. Instead of physically rejecting these cars, the inspector placed "Bad Order" tags on them and sometime later appellee hauled the entire cuts of cars of which these cars were a part, to its Mormon yard, which is $\frac{8}{10}$ of a mile from the Southern Pacific-Santa Fe interchange tracks, and $\frac{7}{8}$ of a mile from the Western Pacific-Santa Fe exchange tracks.

Upon arrival of the defective cars in its Mormon yard, appellee performed the switching necessary to separate them from the non-defective cars, and several hours later the cars named in the complaint were hauled back by appellee to the delivering carriers. Appellee made no effort to repair the cars either on the interchange tracks or in its Mormon yard.

This action is based upon title 45 of the U. S. C. §§ 1 to 16. Sections 2 and 4 are as follows:

SEC. 2. AUTOMATIC COUPLERS. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 4. GRAB IRONS OR HANDHOLDS FOR SECURITY IN COUPLING AND UNCOUPLING CARS. Until otherwise ordered by the Interstate Com-

merce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Section 13 contains a proviso, reading as follows:

* * * *Provided*, That where any car shall have been properly equipped, * * * and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; * * *

Section 14 provides in part as follows:

SEC. 14. LIABILITY FOR USING CAR WITH DEFECTIVE EQUIPMENT EXCEPT AS SPECIFIED. Except that, within the limits specified in section 13 of this title the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, * * *.

QUESTIONS INVOLVED

The basic contentions flowing from the Statement of Points on which appellant intends to rely (eleven in number below) [R. 111-114] involve the following questions:

1. May a carrier lawfully accept cars having defective safety appliances from a delivering carrier, haul such cars to its own yard, nearly a mile away, switch the cars out from other cars, and later return the defective cars over the same route to the delivering carrier in the same condition as when received?

2. Did the handling of these cars as set forth in question No. 1 constitute an acceptance of the cars by appellee from the delivering carriers?

3. Did the movements of the cars referred to in question No. 1 constitute only the incidental movement necessary to carry out appellee's avowed refusal to accept the cars?

STATEMENT OF POINTS ON WHICH APPELLANT RELIES

1. The District Court erred in holding that as to each of the cars involved in this action the "defendant * * * refused to accept said car in its defective condition" (Findings of Fact IV in each cause of action).

2. The District Court erred in holding that the movement by the defendant to each of the defective cars was "incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it" to the delivering carrier (Findings of Fact VII in each cause of action).

3. The District Court erred in holding that the movement by the defendant of each of the defective cars "included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return

it" to the delivering carrier (Findings of Fact VIII on each cause of action).

4. The court erred in holding that the movement of each of the defective cars by the defendant "was the most practical method of disconnecting said car from the nondefective cars and returning it" to the delivering carrier "which could have been adopted under operating conditions prevailing at said place on said date" (Findings of Fact IX on each cause of action).

5. The court erred in holding "that the method adopted by defendant in disconnecting" each of the defective cars "from the nondefective cars with which it was delivered and returning it" to the delivering carrier "subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them" (Findings of Fact XII of each cause of action).

6. The court erred in holding as to each of the defective cars "that any other method of disconnection of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said interchange track" (Findings of Fact XII on each cause of action).

7. The court erred in holding that the movement by the defendant of each of the cars involved in this action "after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the court to be a fact, does not con-

stitute a violation of the provisions of the United States Code, Title 45 Sections 1 to 16, inclusive" (Conclusions of Law I on each cause of action).

8. The court erred in holding "that the method used by the defendant in disconnecting" each of the cars involved in this action, "from the other cars and returning it to the delivering carrier, as * * * found by the court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods" (Conclusions of Law II on each cause of action).

9. The court erred in holding that "the defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16 inclusive" as to any of the cars involved in this action (Conclusions of Law V on each cause of action).

10. The court erred in holding that on each "cause of action defendant is entitled to judgment against plaintiff" (Conclusions of Law VI on each cause of action).

11. The court erred in holding in effect that a carrier knowing cars to be defective before they come into its possession and while asserting refusals to accept them from delivering carriers, may move them approximately a mile and a half over its own lines and justify doing so on the ground that the hauling was only such as was necessary to disconnect them from other cars and redeliver them to the delivering carriers (Finding of Fact III, IV, VI and VII and Con-

clusions of Law I, II, V, and VI on each cause of action).

ARGUMENT

That the requirements of the Safety Appliance Acts are absolute and that nothing less than literal compliance therewith will suffice, is well settled. *St. Louis, Iron Mountain and Southern Ry. v. Taylor*, 210 U. S. 281 (1908), 52 L. Ed. 1061; *Chicago, Burlington & Quincy Ry. v. United States*, 220 U. S. 559 (1911) 55 L. Ed. 582; *Chesapeake & Ohio Ry. v. United States*, 249 Fed. 805 (C. C. A. 6, 1918); *Southern Pacific Co. v. United States*, 23 F. (2d) 61 (C. C. A. 8, 1927).

Under the *original* Safety Appliance Act, as construed by the Supreme Court and by other courts, *any* movement of a car having defective safety appliances subjected the carrier to the statutory penalty. To relax somewhat the harshness of this rule, Congress passed the Act of April 14, 1910, outlining a method whereby cars with defective safety appliances could be hauled for purpose of repair, *but only for repair purposes*. This proviso is now included in section 13, set out on page 5 of this brief. While courts have been called upon a number of times to construe this proviso, attention is directed to only a few citations which hold that this proviso is to be strictly construed and limited to its express terms.

In *Chesapeake & Ohio Ry. v. United States*, 226 Fed. 683, 686 (1915), the Circuit Court of Appeals for the Fourth Circuit said:

Without multiplying citations, it is sufficient to say that the original act as construed by the courts made the carrier liable for any and every movement on its line, in interstate commerce, of a car whose coupling apparatus was out of order. Under no circumstances could such a car be hauled or used without violating the statute; and the penalty was incurred, when a car was moved in a defective condition, even if the carrier had been vigilant to discover the defect and was actually unaware of its existence. Indeed, it was the severity of this absolute prohibition, which did not exempt the necessary movement to a repair shop, that led to the remedial amendment above quoted. But the relief thereby granted is limited by its express terms and manifest intent, and there is no warrant for its further extension. It permits the transfer without penalty of a disabled car to "the nearest available point" where it can be repaired, provided such transfer is necessary because the defects cannot be remedied at the point where they are first discovered, and that is the only movement which does not subject the carrier to liability.

In *Chesapeake & Ohio Ry v. United States*, 249 Fed. 805, 807 (1918), the Circuit Court of Appeals for the Sixth Circuit in construing this proviso, said:

The Safety Appliance Act as originally passed, being remedial and humanitarian in its purpose, is broadly construed, and in clear and unequivocal language imposes on the defendant, as it did on all other interstate railroads, the absolute and unqualified duty of maintaining the safety appliances on its cars in a secure condition.

By its provisions movement on its line, in interstate commerce, of a car with a defective appliance subjected the defendant to a penalty; and this was so, even if it had been vigilant to discover the defect and was actually ignorant of its existence. It being the purpose of the act to produce the highest degree of care in the inspection of cars, for the protection of the lives and limbs of employés, knowledge of defects, diligence in detecting them, and wrong intent in transporting cars with defective appliances, were not made ingredients of the acts condemned. * * * To relax somewhat the rigid rule prescribed by the original act, which did not exempt the necessary movement to a point where repairs could be made, the amendment of April 14, 1910, was enacted. Although the amendment measurably grants relief to and enlarges the right of interstate railroads, it nevertheless is limited by its express terms and manifest intent, and its further extension is unwarranted.

To the same effect is the case of *Denver & Rio Grande R. R. v. United States*, 249 Fed. 822, 827 (1918), wherein the Circuit Court of Appeals for the Eighth Circuit said:

Straightened is the gate and narrow the way marked out by the proviso for the movement of a defective car. Any departure from that narrow way is made by section 5 [Now 45 U. S. C. § 14] of the act unlawful, and subjects the carrier to the penalty of the statute. These restrictions were necessary to prevent the Safety Appliance Law from being destroyed by the privilege granted by the proviso. Congress showed

plainly its purpose that this result should not occur, by the reiterated safeguards, negative and affirmative, which it placed around the privilege.

Thus it is seen that not only was Congress zealous to prevent the beneficial purposes of the Safety Appliance Acts from being destroyed by unwarranted extensions of the privilege of moving for purpose of repair, by the safeguards set up in sections 13 and 14, quoted *supra*, but various circuit courts of appeal, as well as district courts have been equally zealous in restricting the privileges granted in section 13. It is quite clear that the district court in the case at bar has undertaken to grant the type of unwarranted extension of the privilege of handling cars with defective safety appliances which the Circuit Court of Appeals for the Eighth Circuit warned against in the *Denver & Rio Grande* case, *supra*.

The appellee based its whole defense, in the court below, on dicta of the Circuit Court of Appeals for the Sixth Circuit in *Baltimore & Ohio Southwestern R. R. v. United States*, 242 Fed. 420, 425 (1917) reading:

We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the Act; such incidental handling of the car not being in contravention of

the purposes of the Act, but a necessary step in furtherance thereof.

However, on page 424 of the opinion just referred to, the Court said:

We are of opinion that the necessary effect of the clause, "and such equipment shall have become defective or insecure while such car is being used by such carrier upon its line of railroad," as used in this proviso, is to limit the right of hauling a defective car for repairs, without penalty, to the carrier upon whose line of railroad the car was being used when the equipment became defective.

The case just cited was decided upon the government's demurrer to the carrier's answer, the latter having (see p. 422) "alleged that the *defendant received this car on its line* from a connecting line of railroad; that immediately on *receipt* * * * the defendant's inspectors discovered it to be defective; * * * and that * * * the defendant hauled it to its shop, * * * at which it could be repaired." [Our italics.] This, the court condemned. The delivery to the defendant had been completed and there was, on the factual allegations of that case, no question involving any incidental hauling for the purpose of disconnecting the car for return to the delivering carrier. That the above quote from page 425 of the *Baltimore & Ohio Southwestern* case opinion, relied upon by the district court in this case, *loc. cit.* 584, is as we assert dicta merely, is evidenced by the fact that the judgment for the United States, upon which the railroad brought error, was

affirmed by the Sixth Circuit Court in that case. It seems clear therefore that the Sixth Circuit Court never intended to stretch the law so far as the district court has in the instant case. No one connected with the present case is qualified to state just what the circuit court of appeals meant or what induced it to insert the quoted dicta in that opinion. We are strongly of the view that the court had in mind a situation in which as in the *Baltimore & Ohio South-western* case, a carrier discovers just *after receipt on its line*, a car delivered to it in defective condition. It has the car on its hands and has to make some disposition of it. It cannot legally haul it upon its own line for the purpose of repairs (as the defendant did in that case) or otherwise and the incidental hauling *necessary* to disconnect it from the other cars and send it back to the delivering carrier would not be in violation of law. This view finds support in a later decision by the same circuit court of appeals in *United States v. Louisville & Jefferson Bridge & R. R.*, 1 F. (2d), 646 (1924). In that case "the defendant * * * a terminal company * * * *receiving in its yard* cars delivered there by the Illinois Central Railroad" had "pushed in upon *the Terminal Company's* interchange track a cut of some twenty cars" (*doc. cit.* p. 647) among which was the defective car involved in that case. [Our italics.] Shortly thereafter an inspection revealed the presence of the defective car. The defendant terminal company had the car on its hands and had to do something about it. It disconnected the car from the non-defective cars and returned it to the delivering carrier, and its ac-

tion in so doing was approved by the Court. It is to be observed that the defective car, in that case, was not as in the instant case, on an interchange track *between* the line of the delivering carrier and that of the appellee, but was "upon the Terminal Company's interchange track" which was within its own yard. It is to be noted also, that in that case, the defect was discovered *after* the car came into the possession of the defendant, while in the present case, the appellee knew long before it received the cars that they were defective, and in hauling them to its own yard, instead of notifying the carrier that it would not accept delivery, it did so at its peril. Faced in the *Louisville and Jefferson Bridge* case, with the question as to which road was to haul the defective car back to the delivering carrier's line, the court held quite properly that it would involve no more danger for the receiving carrier to haul it back than if the hauling were done by the delivering carrier. The hauling by the receiving carrier in that case was *toward* the delivering carrier's line, *one* movement of the defective car, which could be performed by either road without increasing total dangers, while in the instant case there were *two* movements, both by the receiving carrier, one way from the delivering carrier's lines for almost a mile, and the other back to the delivering carrier's lines, a very obvious doubling of total dangers. Furthermore, in the *Louisville & Jefferson Bridge* case, the defect involved was to the running board on top of the car which the Sixth Circuit Court indicated, page 648, is seldom, if ever, used when the train is in motion, since the train movement is con-

trolled by air brakes and it is unnecessary for trainmen to use the running board to reach the handbrake. But in the instant case, the defective appliances were couplers and handholds, which are quite essential to the safety of employees in switching operations such as were performed by the defendant in its handling of the defective cars.

In *United States v. Northern Pacific Ry.*, 293 Fed. 657 (1924) this court, referred with approval to the dicta in the *Baltimore & Ohio Southwestern* case, *supra*. In the *Northern Pacific* case, this court had before it a situation in which the defective car had been received by the defendant carrier in its own yard before it discovered the defect. In that respect, the facts of the case were like those in the *Louisville & Jefferson Bridge* case, *supra*. But the case differs very vitally from the facts in the *Louisville & Jefferson Bridge* case, the Northern Pacific Ry. having hauled the car for purposes of repair. It was quite properly penalized because the car had not become defective or insecure upon its line of railroad. It becomes quite clear therefore, that the exception referred to when the court in the *Northern Pacific* case said (*loc. cit.* p. 660): "True, the act does not prohibit a mere incidental movement, such as a movement for the purpose of reaching other cars on the exchange track, as held in *Baltimore, Etc. Ry. Co. v. United States*, 242 Fed. 420," was mere dicta when cited by this court, for the very obvious reason that the *Northern Pacific* case, *on its facts*, involved no question of incidental hauling or switching of the defective car for return to the delivering carrier.

Appellee admits that it could not lawfully haul these defective cars for purpose of repair, which would involve one movement, but insists that it could haul them almost a mile to its Mormon yard, switch them out and return them over the same distance to the delivering carrier, *two* movement, without violating the law.

It is well known that the purpose of the Safety Appliance Acts is to provide safety to the employees and the traveling public. If the construction placed upon these Acts by the court below is correct, the law is weakened and the means of carrying out its beneficial purpose is seriously impaired.

In his first message to Congress in 1889, urging the passage of a safety appliance law, President Harrison said:

It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war (21 Cong. Rec. 90 (1889)).

According to recent press dispatches, more Americans were accidentally killed or injured in civilian activities during the period covered by the recent war than in military activities. If the appellee is within its rights in hauling bad-order cars back and forth as in the case at bar, such a practice may, and probably will be multiplied by the number of points at which carriers interchange cars, and since every defective car is a potential source of danger, our already large toll of killed and injured in industrial and traffic accidents will be furthered augmented.

Appellee seeks to justify the manner in which it handled these cars by carrying to a dangerous limit suggestions contained in the *Baltimore & Ohio Southwestern* and *Northern Pacific* cases, *supra*, for the handling of cars *where the delivery and acceptance had been completed* and subsequent inspections disclosed that the safety appliances were out of repair. The claims of heavy traffic conditions, convenience of the carrier, etc., have also been advanced by appellee as reasons for disregarding the plain mandates of this humanitarian law. Such claims have been advanced from time to time since the enactment of the statute, but without success.

District Judge Bledsoe of the District Court for the Southern District of California in *United States v. Atchison, Topeka & Santa Fe Ry.*, 220 Fed. 215, 217 (1915), said:

* * * Under such circumstances this court feels that considerations of "convenience," "practicability," or "expediency" should not be permitted to fritter away or lessen the most commendable purpose of the act in question, * * *.

These same claims of convenience were answered in *Virginian Ry. v. United States*, 223 Fed. 748 (C. C. A. 4, 1915); *Pennsylvania Company v. United States*, 241 Fed. 824 (C. C. A. 6, 1917); *Galveston, Houston & Henderson R. R. v. United States*, 265 Fed. 266 (C. C. A. 5, 1920); *Chicago & Erie R. R. v. United States*, 22 F. (2d) 729 (C. C. A. 7, 1927).

Appellee contends that it did not accept the cars named in the complaint but that all the hauling of

them it did was the incidental movements necessary to receive the cars that were in good order and reject the defective ones and return them to the delivering carriers.

Since the question of intent was left out of the bill when this law was under consideration by Congress, what the appellee did in the instant case must be determined by what was *actually* done, rather than by any claims of intent. What appellee did in this case is exactly what it would have done, if it did not deny acceptance of the cars, except it would not have hauled them back to the delivering carriers. Certainly its employees were subjected to the same dangers they would have had to face in accepting the cars, plus the dangers in hauling the cars back to the delivering carriers. Every car with defective safety appliances is a constant source of danger.

No movement of the defective cars was necessary in this case for the appellee to carry out its avowed purpose of refusing to accept the cars. They had not reached the appellee's yard or tracks as in the *Louisville & Jefferson Bridge* and *Northern Pacific* cases, *supra*, but were on a mere transfer track. Appellee had full knowledge of the condition of these cars before handling them. The defective cars were the responsibility of the delivering carriers. Had appellee been as diligent in protecting its employees from the dangers of handling defective cars as it has been in seeking to justify the movements complained of after suit has been filed, no movement of these cars would have been made.

Prior to Rule 75 (g) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following sec. 723c (effective Sept. 16, 1938), an opinion of a district court would not have formed a part of the record on appeal to a circuit court, *United States v. John Ii Estate, Ltd.*, 91 F. (2d) 93 (C. C. A. 9), *cert. denied*, 302 U. S. 746 (1937), and the right of either party to comment upon its contents was somewhat circumscribed. However, Rule 75 (g) requires that there shall always be certified and transmitted to the circuit court among other things, whether designated by the parties or not, copies of any opinions filed below or delivered in the case and the rule states that "matter so certified and transmitted constitutes the record on appeal." It may properly be urged that the effect of this rule is to make the opinion a part of the record on appeal and to, in this respect, require a departure from the holding in the *John Ii Estate* case, *supra*, and others like it. Then, too, at the very outset of the Rules of this Court, it is stated that "The Federal Rules of Civil Procedure, whenever applicable are hereby adopted as part of the rules of this court with respect to appeals in actions of a civil nature." But even, before Rule 75 (g), transmission of the "opinion or opinions of the [lower] court" (among other things) was required by Rule 14 (1) of this Court, in force at least until it was in this respect supplanted by Rule 75 (g) of the Federal Rules of Civil Procedure, *supra*, and the opinion was regarded as "one of the papers or proceedings necessary or material to the review," Cyc. of Fed. Proc. 2d Ed., Sec. 5552, and altho (prior to Rule 75 (g)) not part of the "record," the "opinions

so sent up serve the purpose of explaining and giving understanding of what was done, as shown by other parts of the record," *ibid. Nashua & Lowell Railroad Corp. v. Boston & Lowell Railroad Corp.*, 61 Fed. 237, 240-241 (C. C. A. 1, 1894); *Teller v. United States*, 111 Fed. 119 (C. C. A. 8, 1901).

Contrary to the terms of Rule 75 (g), the Clerk of the District Court has not included in his certification and transmission of the record, the opinion of that court. It is the appellant's intention to obtain a certified copy of the opinion and to offer the same for filing in this court, to be printed as a supplement to the present record. This cannot be accomplished prior to the filing of this brief and accordingly the appellant in discussing the opinion must refer to the same as reported in *United States v. Atchison, Topeka & Santa Fe Ry.*, 61 F. Supp. 580 (1945).

The opinion of the district court contains several misconceptions of the requirements of the Safety Appliance Acts as construed by the courts.

In paragraph [1] of the opinion, *loc. cit.* 582, the appellee is excused for doing what it did because the lower court found that it had acted in good faith. The Supreme Court has long held that the requirements of the Act in question are absolute and that nothing less than *literal* compliance with its terms will suffice. No room accordingly is left for the application of any doctrine predicated upon considerations of "good faith." See *St. Joseph & Grand Island Ry. v. Moore*, 243 U. S. 311, 315 (1917), 61 L. Ed. 741, 746; *St. Louis, Iron Mountain and Southern Ry. v. Taylor*, *supra*, 294-296, L. Ed. 1067-1068.

In paragraph [2] of the opinion, *loc. cit.* 582, the district court raises the question of "use" of the cars, stating that such use must be substantial and primarily connected with actual transportation of persons or property for hire. The statute by its terms (45 U. S. C. § 13) imposes the penalty upon "Any common carrier * * * using, hauling, or permitting to be *used or hauled* on its line * * *" any defective car. [Our italics.] A defect on an empty car is just as much a source of danger as one on a loaded car, and in the case at bar the source of danger to the employees using these particular defective appliances is practically nonexistent when the trains are made up and moving, the principal danger being when the cars are being coupled and uncoupled. However, in *Brady v. Terminal Railroad Assoc.*, 303 U. S. 10 (1938), 82 L. Ed. 614, the Supreme Court held that where a car had been placed on an interchange track but had not as yet been accepted by the receiving carrier, it was in use by the delivering carrier, although at the time the car was motionless. To the same effect is *Chicago Great Western R. R. v. Schendel*, 267 U. S. 287 (1925), 69 L. Ed. 614; *Minneapolis, St. Paul & S. S. Marie Ry. v. Goneau*, 269 U. S. 406 (1926), 70 L. Ed. 335; *Cusson v. Canadian Pacific Ry.*, 115 F. (2d) 430, (C. C. A. 2, 1940).

In paragraph [4] of the opinion, *loc. cit.* 582, the statement is made that, "The spirit of the law calls for the exaction of the penalty only if the movement is of such substantiality, and under such circumstances, as to defeat the purposes of the enactment." The terms of the statute are, however, plain, pro-

viding a penalty for *any* movement of a car having defective safety appliances except under the proviso of Section 13, *supra*. There is no qualification of the movement condemned. In *United States v. Chesapeake & Ohio Ry.*, 213 Fed. 748, 752 (1914) the Circuit Court of Appeals for the Fourth Circuit held that the movement prohibited applied to movements in yards and on side tracks.

The court in paragraph [4] of the opinion makes much of the "reasonableness" of the application of the law. There is however no room to read into a statute which the Supreme Court has held to be absolute in its application, *St. Louis, Iron Mountain and Southern Ry. v. Taylor, supra*; *Chicago, Burlington & Quincy Ry. v. United States, supra*, the doctrine which the district court here sought to apply, of what might be termed "reasonableness absoluteness," in an effort to make the application of the statute *reasonably* absolute. To even state such a doctrine presents an incongruity. The court was clearly wrong in saying that the statute requires the exaction of the penalty only if the movement is substantial, but even so, a movement for a mile and a half ought to be regarded as a substantial one. Many of the decided cases have imposed penalties for much shorter movements. See for example *United States v. Northern Pacific Ry., supra*, at 660 where in similar circumstances the penalty was affirmed by this court for a movement "of half a mile or more."

The district court opinion, *loc. cit.* 583, undertakes to deal with the harshness of a literal construction of the law. In *St. Louis, Iron Mountain and Southern*

Ry. v. Taylor, supra, 295, L. Ed. 1068 the Supreme Court said: "It is urged that this is a harsh construction. To this we reply that, if it be true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body." The construction contended for by the Government in the instant case is not a harsh one but is one in furtherance of the humane purposes of the Act. To permit appellee or other carriers to move defective cars back and forth at will between two or more points in the same yard is a harsh construction against the safety of the employees involved.

The district court opinion, *loc. cit.* 583, quotes from *United States v. Illinois Central R. Co.*, 156 F. 182, 190 (D. C. W. Ky., 1907) a supposed set of facts in which it is claimed that, in case an accident occurs to a train or cars en route and safety appliances become defective, the carrier would violate the law in moving the train at all. The Government makes no such claim, nor could it. In the supposed case, the accident would have occurred and the appliances would have become defective on the line of the carrier operating the train; and, under Section 13, *supra*, it would be permitted to move the train or cars to the nearest available repair point without penalty.

In the administration of this law, the Interstate Commerce Commission, "the executive officers" at whose instance these proceedings are brought, endeavor to apply that common sense referred to by the

district court in the last section of paragraph [4] of its opinion, *loc. cit.* 583, but cannot blind itself to the holding in *St. Joseph & Grand Island Ry. v. Moore*, *supra*, 315 L. Ed. 746, that nothing less than literal compliance with the terms of the statute will suffice.

In paragraph [5] of the district court opinion, *loc. cit.* 583, the court expresses the belief that section 13 of Title 45 of the code indicates "That leeway should be allowed to railroads with respect to repairs" by allowing the hauling of equipment "discovered to be defective or insecure to the nearest available point where such car can be repaired," and states "Necessarily, the determination of what is the 'nearest available point' and what is a reasonable movement of equipment involves judicial discretion." But, in the case at bar the appellee distinctly disclaims any movement for purpose of repair. In invoking section 13 to bolster its conclusion, the district court fails to take into consideration the terms of section 14, *supra*. Section 13 sets forth two points at which a carrier can repair cars which become defective on its lines without incurring a penalty. These, however, are strictly limited to the carrier upon whose lines the cars become defective. No remedy is offered to a receiving carrier. Section 14 states that except within the (narrow) limits specified in section 13, *all* other movement of defective cars is unlawful, thus evincing a determined purpose on the part of Congress to limit the movement of defective cars to the carrier upon whose lines they become defective. Had the appellee obeyed the injunction of this court set forth in the

language quoted (*loc. cit.* 583) by the district court from *United States v. Northern Pacific Ry.*, 287 Fed. 780, 784 (1923), it would have “refused [d] so to *haul* them” [our italics] after inspecting the cars and finding them defective. Thus the very case cited by the district court and decided by the circuit court of appeals for its own circuit refutes the district court’s conclusion.

The district court in the concluding paragraphs of its opinion in the instant case adverts to the circumstance that the alleged violations took place in time of war when the traffic burden upon the defendant was unusually heavy. No one would undertake to question the war as being in its nature an emergency, but unlike the Hours of Service Law (45 U. S. C. §§ 61-64) Congress made no provision for relief from the absolute terms of the Safety Appliance Acts in case of an emergency and it appears that the appellee was using the war as a cloak to do what it knew to be unlawful. The Interstate Commerce Commission which has the administrative responsibility for enforcing the Safety Appliance Acts and at whose instance the present proceeding was brought, is made up of a body of transportation experts. It knew that the railroads were taxed beyond measure to carry the large volume of traffic offered them during the war. But in order to perform this task efficiently and expeditiously, the carriers had to rely upon experienced and unmaimed railroad men to operate the trains. In addition to carrying out the humane purposes of the law, the enforcement of these and other laws of a similar purpose was in furtherance and

not in diminution of the war effort, by reason of the protection afforded to experienced railroad employees, troops, passengers and valuable cargoes of supplies, a not unimportant function in winning the war.

The penultimate paragraph of the district court's opinion is to the effect that the appellee was in need of the nondefective cars to which the defective cars were connected and that the evidence as a whole sustains appellee's actions as *reasonable* and *practical* under the circumstances. To contend that knowingly hauling cars with defective safety appliances for a distance of about a mile, switching them around and several hours later returning the same cars with the same defects, to their point of origin, is the most practical manner of handling them, and at the same time to carry out the purpose of the Safety Appliance Acts, is placing a strained construction on this highly remedial statute. It leads to the conclusion that practicability is the guiding star of operations of the appellee instead of safety to its employees and the traveling public. In *Pennsylvania Company v. United States*, *supra*, 830 the Sixth Circuit Court of Appeals in a Safety Appliance Act case answered this argument of convenience or practicability in these words:

But arguments of convenience cannot prevail against an absolute and mandatory provision, designed for the protection, not only of employes of the given train, but of employes and travelers on other trains.

In *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 351 (1916), 60 L. Ed. 1037, 1041, the Supreme

Court in answering the argument of difficulty in complying with the requirements of this statute, said:

But this merely asserts that the statute may be violated with impunity if only the railroad finds its provisions onerous or deems it expedient to do so.

This thread of inconvenience to the carrier, coupled with the theoretical delay unnamed trains might possibly be subjected to if the appellee attempted to switch out the defective cars at the interchange tracks before movement to its Mormon yard began, ran through the entire defense and found support in the district court's decision. The position of the appellee at the trial and in its trial brief gave no evidence of any concern or responsibility for carrying out the remedial purposes of the Safety Appliance Acts and furnishing the protection demanded by the statute for the employees and the traveling public. In similar fashion these considerations are also lacking in the district court's opinion.

If the decision of the district court in this case is allowed to stand, it will be an invitation to other carriers to haul cars with defective safety appliances back and forth at will, not only for one mile each way, but for greater distances. The courts have been careful to limit the movement of defective cars to the carrier upon whose line of road they became defective, and even in those instances the movements were restricted to those actually necessary for purposes of repair.

CONCLUSION

In conclusion it is respectfully submitted that as the movement of cars having defective safety appliances is by the statute limited to the carrier upon whose line of road they became defective, and as the cars in this case did not become defective while being used upon appellee's line of road, the appellee has violated the Safety Appliance Acts in hauling the cars in the manner previously referred to. Since appellee knew that the cars were defective *before* it received them, it cannot be heard to say that it was making only the movements necessary to disconnect and reject the cars.

It is further submitted that what appellee actually did in this case constituted an acceptance and hauling of the cars in violation of the plain terms of the statute and the judgment of the district court should be reversed.

Respectfully submitted.

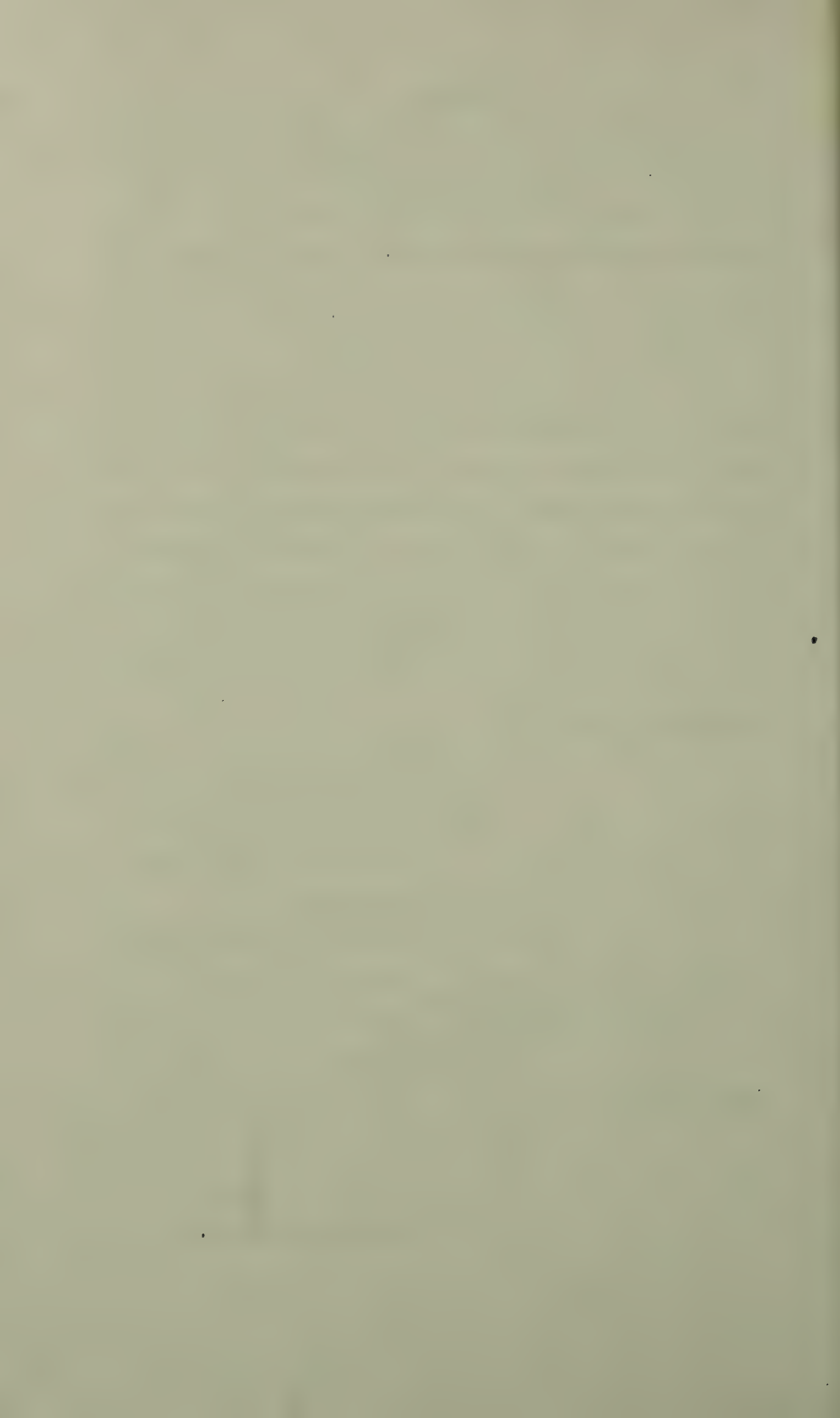
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APRIL 1946.



No. 11237

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLEE.

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ATCHINSON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLEE.

Basis of Jurisdiction.

Appellee does not question the jurisdiction of the Court.

Statement of the Case.

In accordance with the usual rule, appellee is entitled to a statement of facts in accordance with the findings of the trial court and without regard to conflicting evidence presented by appellant.

The cars in question were placed on the respective interchange tracks by the respective delivering carriers in the admitted defective condition and connected in strings or trains of cars which were not defective so as to make it impossible to move or use the nondefective cars without the movement of the defective cars.

The appellee inspected the cars on the interchange tracks, discovered the defects, and “refused to accept the cars in that condition.” [R. 44, 45, 46, 47.]

The appellee disconnected the defective cars from the nondefective cars by pulling the entire train off the interchange track to its yard where switching tracks were available, did the switching necessary to separate the defective cars from the nondefective cars, and shoved the defective cars back on the interchange tracks.

The movement of the defective cars was incidental to and necessary in disconnecting them from the remaining nondefective cars and included only the minimum number of switching operations necessary to accomplish that purpose.

The method adopted by appellee to disconnect the defective cars from the nondefective cars was the most practical that could have been adopted by appellee and subjected its employees to no greater hazard than any other method which it could have adopted.

In its statement of the case, appellant says: “Appellee claims it had not accepted the defective cars.” The fact is that appellant *stipulated* that appellee refused to accept these cars. [R. 44, 45, 46, 47.]

Further in the statement, appellant says: “Appellee claims” it engaged in only the incidental handling necessary to disconnect the defective cars from the nondefective cars. The whole question presented to the trial court and most of the evidence produced was on the issue as to

whether or not the admitted handling was merely incidental to disconnecting the defective cars from the non-defective cars, and the trial court found as a fact that it was necessary and incidental to this purpose on the basis of conflicting evidence; so on these points there is no longer a "claim" but a fact determined and not subject to review.

Questions Involved.

Appellant's statement of the questions involved is argumentative and incorporates questions concerning facts found adverse to it by the trial court. Stripped of these fact questions as it must be for review by this Court, only one question remains, namely: Is it permissible under the Safety Appliance Act for a receiving carrier to make the switching movements necessary to disconnect a defective car from other nondefective cars when such defective car is placed on an interchange track by another carrier, so coupled with nondefective cars as to make it impossible to use the nondefective cars without the incidental movement and switching of the defective car?

That this is the sole question remaining before this Court is indicated by a brief examination of appellant's statement of points relied on.

1. Appellant claims the court below erred in finding that appellee refused to accept the cars in their defective condition. Appellant stipulated that appellee refused to accept these cars. [R. 44, 45, 46, 47.]

2. Appellant claims the court below erred in holding the movement of cars was incidental and necessary in disconnecting them from the remaining nondefective cars and returning the defective cars. Practically the entire testimony below was directed to the question as to whether or not the movements performed were necessary and incidental; and the testimony of appellee's Witness Kingston [R. 51 to 88, incl.] amply supports the court's finding in this regard.

3. Appellant claims the court below erred in finding that only the minimum number of switching operations necessary to disconnect the defective cars was performed. This finding was based not only on the testimony of appellee's Witness Kingston [R. 62] but also on the testimony of appellant's Witness Hynds. [R. 107, 108.]

4. Appellant claims the court below erred in finding that the method of disconnection adopted by appellee was the most practical under operating conditions prevailing. This finding is abundantly supported by the testimony of Witness Kingston. [R. 55 to 88, incl.]

5. Appellant claims that the court below erred in finding that the method of disconnecting adopted by appellee subjected its employees to no greater hazard than any other possible method. The nature of the defects stipulated to were such as to subject employees to the hazard of going between cars in coupling and uncoupling and, in the one case, the use of a bent grabiron in coupling and uncoupling. Obviously, the hazard existed only at the time coupling and uncoupling was being performed and this,

of course, took place only in connection with switching movements. Since the minimum number of switching movements was made that could have been performed by any other method [Kingston, R. 62; Hynds, R. 107, 108], the trainmen were obviously not subjected to any greater hazard than they would have been subjected to by any other method of switching that might be suggested; and the court was, therefore, amply justified in making this finding.

6. Appellant claims the court erred in finding that other suggested methods of switching would subject other employees and the public to greater hazard than the method employed. This finding was, of course, not necessary to support the judgment on any theory; but, in any event, it was abundantly supported by the testimony of Witness Kingston. [R. 55 to 88, incl.]

7, 8, 9, 10 and 11. These specifications of error, except where they refer to findings of fact heretofore discussed, are addressed to the conclusions of law of the trial court and present only the one issue of law already asserted by appellee, that is, is a movement of a defective car necessary to disconnect it from nondefective cars in order to obtain the nondefective cars under the stated conditions, a permissible movement under the Safety Appliance Act?

ARGUMENT.

I.

Facts Found by the Trial Court Are Conclusive on Appeal.

Since the facts found by the trial court and complained of by appellant are supported either by stipulation of the parties or by conflicting evidence, they are not open to review by this Court. Rule 52a, *Rules of Civil Procedure*, provides:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

That this rule constitutes simply a reiteration of the familiar rule existing before the adoption of the Federal Rules, namely, that the findings of a trial court where based upon conflicting evidence are presumptively correct and unless some obvious error of law or mistake of fact has intervened they will be permitted to stand, is clearly held in the decision of this Court in *Wittmayer v. United States* (C. C. A. 9, 1941), 118 F. (2d) 808.

II.

The Incidental Movements of Defective Cars Necessary to Disconnect Them From Nondefective Cars in Order to Use the Nondefective Cars When Such Defective Cars Have Been Placed on an Interchange Track by Another Carrier, Coupled With Nondefective Cars, Is Not a Violation of the Safety Appliance Act.

This proposition is the fundamental proposition involved in this case and appellee contends this is the only issue before this Court. It is interesting to note the subtle manner in which the appellant has changed its position with regard to this issue, as compared with its presentation to the trial court. Actually, this proposition of law was admitted by appellant in the trial below when counsel for appellant said:

“The incidental hauling that was necessary to disconnect the bad-order cars from the good-order cars we don’t raise any question as to law in that case. The 6th and 9th circuit have passed on that, and I think they have not only laid down good law, but they have laid down good common sense.” [R. 75, 76.]

Again in appellant’s brief before the trial court the same statement was repeated. It will be noticed that the defendant’s Answer, which was in the nature of a confession and avoidance, admitted the handling of these cars and only alleged, “that such handling * * * was the mere incidental handling necessary to disconnect the same from the cars which were not defective.”

[R. 7, 8, 9, 10, 11, 12.] No motion to dismiss or any claim by other pleading that this Answer failed to constitute a defense was ever interposed; rather, the entire theory of the Government at the trial of the action was that the necessity for the switching movements should have been determined adversely to appellant. It now, at least inferentially, disclaims its admission as to the existence of this exception to the literal terms of the Safety Appliance Act and cites numerous cases to the effect that no movement of a defective car is permissible. (Appellant's Brief, p. 9.) It does not yet, however (possibly because of the inconsistency of such a position) contend that the rule heretofore stated and announced by the Sixth Circuit Court of Appeals in *Baltimore & O. S. W. R. Co. v. United States* (1917), 242 Fed. 420, and *United States v. Louisville & J. Bridge & R. Co.* (1924, 1 F. (2d) 646, and by this Court in *United States v. Northern Pac. Ry. Co.* (1924), 293 Fed. 657, is not the law but rather it attempts to distinguish those cases from the case at bar.

Appellee has not been able to discover, nor has appellant cited any cases, discussing the exact question involved in this case with the exception of the three cases cited above. All of the cases cited by appellant for its proposition that literal compliance with the Safety Appliance Act is required deal with a fact situation not in any degree similar to that presented by the case at bar, nor do the courts in any of those cases discuss by way of dicta, or otherwise, the proposition contended for in this case. Appellee's entire case is based upon the three cases cited above and the fundamental law upon which they are grounded, and is in accord with the statement of appellant's counsel made at the time of the trial before the lower court, namely,

that the courts in those cases have “not only laid down good law, but they have laid down good common sense.” [R. 75, 76.] The first case to announce this exception to the harsh rule now contended for by appellant was *Baltimore & O. S. W. R. Co. v. United States* (C. C. A. 6, 1917), 242 Fed. 420, when that court made the statement quoted in appellant’s brief, page 12:

“We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the Act; such incidental handling of the car not being in contravention of the purposes of the Act, but a necessary step in furtherance thereof.”

Appellant in its brief goes to some length to show that this quoted language was only dicta in that case. Appellant admits that this language is dicta, but simply contends that the rule stated is nevertheless sound.

This Court, in *United States v. Northern Pac. Ry. Co.* (C. C. A. 9, 1924), 293 Fed. 657, said:

“Under the law the defendant in error was forbidden to haul this car over its lines any distance, for any purpose, because the defect arose on the lines of another carrier. * * * True, the act does not prohibit a mere incidental movement, such as a movement for the purpose of reaching other cars on the exchange track, as held in *Baltimore, etc., Ry. Co. v. United States*, 242 F. 420, 155 C. C. A. 196; but this was not such a movement.”

It is quite apparent from the foregoing quotation itself that this Court's announcement of the exception for which we are now contending was in the nature of dicta but, dicta or not, the rule stated is not only good law but good common sense.

With respect to the last of these three cases, however, no question of dicta is involved. This case, *United States v. Louisville & J. Bridge & R. Co.* (C. C. A. 6, 1924), 1 F. (2d) 646, had to decide and did decide that incidental handling necessary to disconnect a defective car from non-defective cars in order to use the nondefective cars and return the defective one, and after such a string of cars had been placed upon an exchange track, constituted an exception to the literal language of the Safety Appliance Act. Appellant, in attempting to distinguish this case from the case at bar, reveals its purpose in its repudiation of its stipulation in the trial court to the effect that appellee refused to accept the defective cars [R. 43, 44, 45, 46, 47] in now contending that the receiving carrier in *United States v. Louisville & J. Bridge & R. Co.*, *supra*, found the cars in its yard and merely shoved them back to the delivering carrier; whereas, appellant in this case took the cars from the line of the delivering carrier onto its own line and thereby accepted the cars. Even aside from the repudiation of the stipulation involved which should be binding on appellant here, *Brown v. Gurney* (1906), 26 Sup. Ct. Rep. 509, 201 U. S. 184, 50 L. Ed. 717, the distinction sought to be made is wholly artificial and based upon minute factual differentiation; it amounts to the difference between tweedledee and tweedledum. A brief review of *United States v. Louisville & J. Bridge & R. Co.*, *supra*, will indicate that it is on all fours with the case at bar as far as the applicable principle of law is involved. In *United States v. Louisville & J. Bridge & R. Co.*, *supra*,

the defective car and other cars were placed upon the terminal company's "interchange track." In the case at bar, the cars were placed upon the interchange tracks between appellee and the delivering carriers. There was no more necessity for the terminal company's handling of the defective cars in that case than there was for appellant's handling of the defective car in this case. Certainly the location of the interchange track would not change this necessity. The terminal company could have as easily foregone the use of the nondefective cars with possible damage to their contents, while waiting for the Illinois Central to come and switch out the defective cars, as appellant could have foregone the use of the nondefective cars and the possible deterioration of their contents while waiting for the delivering carriers to switch out the defective cars. As far as the movement itself is concerned, the terminal company in *United States v. Louisville & J. Bridge & R. Co.*, *supra*, had to pull the cars off of the interchange track, a distance which does not appear, switch out the defective car, place it on some adjacent track, then some hours later pick it up with a string of other cars, shove it back on the interchange track and then beyond the interchange track for a distance, as indicated by the court's reference to the case of *Louisville & J. Bridge Co. v. United States*, 249 U. S. 534, 39 Sup. Ct. Rep. 355, 63 L. Ed. 757, "of over three-quarters of a mile, and involved crossing, at grade, three city streets once, two streets twice, one street three times, and a main track movement of at least 2,600 feet, with two stops and startings on the main track." In the case at bar, appellee merely pulled the string of cars in one continuous movement off of the interchange track back to its Mormon Yards, cut out the defective car, and in one continuous movement shoved the defective car back to the interchange track. Appellee's

movement of the defective car involved actually far less handling than the movement which was approved in *United States v. Louisville & J. Bridge & R. Co.* (C. C. A. 6, 1924), 1 F. (2d) 646.

The decision in *United States v. Louisville & J. Bridge & R. Co.*, supra, and the dicta of this Court and of the Circuit Court of Appeals for the Sixth Circuit, in the two other cases heretofore discussed and relied upon by appellee, are based upon a sound principle of statutory construction. If the Court should hold that this right of incidental handling is not permissible under the Safety Appliance statute, it would result in absurd consequences. It would mean that a carrier would be forced to permit large numbers of cars containing all manner of cargoes, perishable and otherwise, to remain standing on interchange tracks until the delivering carriers should come to switch out the defective cars, even though in so doing the delivering carriers would have to go through approximately the same type and number of switching movements as the receiving carrier would have to perform in order to use the non-defective cars. Even the literal interpretation suggested by appellant would not require such a result.

The literal application of a statute which leads to absurd consequences is to be avoided wherever possible. *United States v. Ryan*, 52 Sup. Ct. 65, 284 U. S. 167, 76 L. Ed. 224; *United States v. Katz*, 46 Sup. Ct. Rep. 513, 271 U. S. 354, 70 L. Ed. 986.

It is also true that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity v. United States*, 12 Sup. Ct. Rep. 511, 143 U. S. 457, 36 L. Ed. 226.

"All statutes must be construed in the light of their purpose. A literal reading of them which would lead

to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose." *Haggar Co. v. Helvering*, 60 Sup. Ct. 337, 308 U. S. 389, 84 L. Ed. 340.

It is submitted that the exception to the literal application of the Safety Appliance Act, contended for by appellee, is supported by the only authorities in point on the question and that those authorities are well grounded in law and "based on common sense."

III.

Appellant's Contention That a Movement for One Purpose Being Unlawful, a Movement for Any Other Purpose Would Likewise Be Unlawful.

Appellant, in its brief, page 17, insists that since appellee could not have hauled the cars in question over the tracks where it did haul them for the purpose of repair, then it likewise could not haul the cars over the same tracks in an incidental movement necessary to disconnect the defective cars from the nondefective cars. This argument is appealing at first blush but has no real merit in view of the necessities of the case. There would have been no compelling necessity in the absence of the other circumstances mentioned for appellee to have hauled the cars for the purpose of repair, and such an unnecessary movement would be, therefore, in violation of the statute regardless of what tracks the movement was made over. The movement actually made, however, was made because of the necessities involved in disconnecting the defective cars from the nondefective cars, and it is this necessity which gives rise to the exception contended for, not the tracks over which the movement was made. Appellant

could just as readily contend that the defendant in *United States v. Louisville & J. Bridge & R. Co.*, *supra*, could not be heard to say that it could make the movements necessary to disconnect and return the defective cars if it could not make the same movement for the purpose of repairing the cars. The mere fact that the same movement or even a shorter movement might be prohibited under other circumstances is no reason why such a movement should be prohibited under the necessities involved in the case at bar.

IV.

Appellant's Comments on the Opinion of the Trial Court.

It is, of course, not necessary to argue and support every comment made by the trial court in its decision, for the reason that where the decision of the trial court is correct it must be affirmed though the lower tribunal may give a wrong reason. *J. E. Riley Investment Company v. Commissioner of Internal Revenue*, 61 Sup. Ct. 95, 311 U. S. 55, 85 L. Ed. 36; *Securities and Exchange Commission v. Chenery Corporation*, 63 Sup. Ct. 454, 318 U. S. 80, 87 L. Ed. 626.

On page 21 of its brief, appellant suggests that the trial court excused appellee's actions on the basis of its good faith, which appellant says is not a sufficient excuse. Appellant overlooks the fact that the trial court had before it not only the single question of law before this Court on appeal, and which was admitted in the trial court, but that the trial court had the question of fact, first, as to whether or not the handling of the car was only incidental and necessary to its disconnection from other cars, and the additional contention made by appellant that the switching movements should be performed at some point other than

the place where they were actually performed. The comments of the court in this connection really go only to the good faith of appellee in its selection of the particular switch where the switching was to be done.

With reference to paragraph 2 of the court's opinion, appellant in its brief, page 22, cites authority supposedly for the position that the defective cars involved here were in use by appellee under the facts of the case at bar. The first of these cases, *Brady v. Terminal Railroad Assoc.*, (1938), 303 U. S. 10, 82 L. Ed. 614, was a suit for a personal injury against the carrier which had placed a defective car on an interchange track, that would have been the delivering carrier in the case at bar, and it was held that the car was in the use of the carrier which placed it on the interchange track. It is also to be noted that the same plaintiff had brought suit against the receiving carrier, that is, the one who would have been in the same position as the appellee in this case, and that suit was lost, it being held that the receiving carrier was not using the car in question; so that appellant's citation of authority bolsters the trial court's suggestion (made by way of inducement only) that the car in question was in the use of the delivering carriers and not this appellee. The other cases cited by appellee on this point, that is, *Chicago Great Western R. R. v. Schendel* (1925), 267 U. S. 287, 69 L. Ed. 614; *Minneapolis, St. Paul & S. S. Marie Ry. v. Goneau* (1926), 269 U. S. 406, 70 L. Ed. 335; *Cusson v. Canadian Pacific Ry.*, 115 F. (2d) 430, all involve cases of cars becoming defective on the line of the carrier involved, except the last case and that was one in which a defective car on another line was being used in switching movements not involving the defective car.

Appellant attacks the trial court's opinion, paragraph 4, in its brief, pages 23, 24, and 25, on the theory that there

is no room for any construction of the Safety Appliance Act other than the harsh and literal construction contended for by appellant. The argument of the court in this paragraph and the authorities which it cites are authorities directed toward the basic proposition that an absurd or unreasonable result should not be arrived at and that a statute should be open to construction as well as interpretation. The arguments of the court in this regard are in effect a discussion of fundamental principles leading to the acceptance of the principles announced in *United States v. Northern Pac. Ry. Co.*, *supra*; *United States v. Louisville & J. Bridge & R. Co.*, *supra*; and *Baltimore & O. S. W. R. Co. v. United States*, *supra*, and as such are not detracted from by appellant's citations of the same list of cases cited at the beginning of its argument (App. Br. p. 9) requiring, under other circumstances and in the absence of the necessities involved in the case at bar, literal compliance with the statute.

Appellant attacks paragraph 5 of the court's opinion, page 25 of its brief, for having suggested that Congress intended some leeway when it enacted section 13 of the Safety Appliance Act relating to repair, and wherein the trial court comments that judicial discretion is involved to determine where the nearest available point is and what a reasonable movement consists of. Appellant apparently has entirely misconstrued the purpose of the trial court in mentioning these considerations. Appellee believes that the court was simply using this by way of analogy to show that some judicial discretion is involved in the application of any statute, some discretion over and above that which appellant contends is completely and entirely vested in "the executive officers." It is true that judicial discretion would be involved in applying section 13 of the Safety Appliance Act to enable a court to determine whether or not a fact

situation came within section 13; and, likewise, judicial discretion must be exercised in the case at bar to determine whether or not the facts in this case, where no repairs are involved, bring it within the spirit and meaning of the prohibitions contained in the Safety Appliance Act. It is at this point that appellant belatedly takes the position that the receiving carrier has no remedy but to sit and wait until the delivering carrier comes and switches out the defective cars, and by taking this position appellant now repudiates its own statement of the law as made to the trial court, repudiates the three cases upon which appellee relied in the trial court, that the trial court relied upon in its opinion, and which appellee continues to rely upon in this Court, namely, *United States v. Louisville & J. Bridge & R. Co.*, *supra*; *United States v. Northern Pac. Ry. Co.*, *supra*; and *Baltimore & O. S. W. R. Co. v. United States*, *supra*.

On pages 26, 27 and 28 of its brief, appellant complains about the trial court's mention of the wartime conditions under which the alleged violations occurred. This mention, of course, would in no manner be necessary to support the judgment of the court. However, it would seem entirely proper to mention the extremely difficult conditions under which appellee was operating not in order to change the Safety Appliance Act nor to announce any new or different rules of law, but rather that the necessities of the case as contended for by appellee were real and not imaginary. In this portion of its brief, the Government again emphasizes the distance of the movement of the cars involved. This, seemingly, is the factor which appellant continually complains about. In fact, the length of the movement involved bears no relation whatever to the purposes of the Safety Appliance Act, which is admittedly

for the purpose of protecting railroad employees from injury. During any or all of the time that these cars were in motion, coupled together as a train, they presented no hazard whatever to railroad employees. If any hazard at all was involved, it was involved at such times as employees might be engaged in uncoupling the defective cars and thereby going between them. If appellant reasonably thought that more hazard was involved in the movement performed in this case than might be involved in some other movement, its contention would have been that the appellee made more than the necessary number of switching moves with the cars, thereby increasing the number of couplings and uncouplings to be made, and increased thereby the hazard to employees. This it cannot do, either under the facts or under the findings of the trial court, and yet it insists that a dangerous precedent is involved because of the movement of the cars for less than a mile in either direction. The distance involved is of no bearing whatever.

On page 27 of appellant's brief, appellant again reiterates that there is no room for any reasonable or practical construction of the literal terms of the statute and, on page 28 of the brief, appellant contends that the thread of inconvenience runs through the case and is the basis for the trial court's decision. In order to understand these references by the trial court to matters of reasonableness, inconvenience, etc., it is necessary to again notice the manner in which the issues were presented to the trial court. In the first place, the Government had agreed that incidental movements were permissible. [R. 75, 76.] It then attempted to show that the switching movements should have been performed at some switch nearer the transfer tracks than the Mormon Yard in order to make out its

case that the movements involved were not merely incidental. Appellee's position then was that the incidental movements, if performed in accordance with reasonable operating practices involving no more switching movements than would be performed at the switches designated by appellant, would be in accordance with the agreed principle of law that incidental movements are permissible. Once having admitted the existence of the exception and as soon as it was ascertained that the switching movements involved represented only the minimum number necessary to accomplish the permitted object, then the selection of the particular switch where the movements were to be performed should be left to determination under operating conditions existing and the Government should not be permitted to say that the necessary and incidental switching should have been performed at some other switch. Once the movements appear to be within the exception, some choice in the manner of their performance must be allowed; otherwise, the Government could always contend that the switching should have been performed at some other switch, just as it did in this case. The court's references to the operating conditions, reasonableness, convenience, etc., all relate to this question of appellee's choice of the point where the necessary switching was to be performed, not the question as to whether or not necessary switching incidental to disconnecting defective cars from nondefective cars is permissible under the statute. The court's opinion amounts simply to this: First, it is permissible to make the switching movements necessary to disconnect the defective cars on the authority of the three cases heretofore discussed and under the general principles of statutory construction. Second, the switching movements performed by appellee were only the minimum num-

ber of movements necessary to perform this permitted objective. Third, appellee's choice of the place where this switching should be done came not only within the requirements of the necessities of the situation but in addition was reasonable and practical under the circumstances existing.

Conclusion.

The announced principle of law that a carrier may perform switching movements necessary and incidental to reaching and using nondefective cars when they are placed upon a transfer track by another carrier, coupled with defective cars, is well supported by reason and authority; that the movements performed in the case at bar were incidental and necessary to such disconnection has been determined by the trial court on the basis of stipulations and conflicting evidence, and is, therefore, not reviewable by this Court, and it, therefore, follows that the decision of the trial court should be affirmed.

Respectfully submitted,

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